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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 415. 158

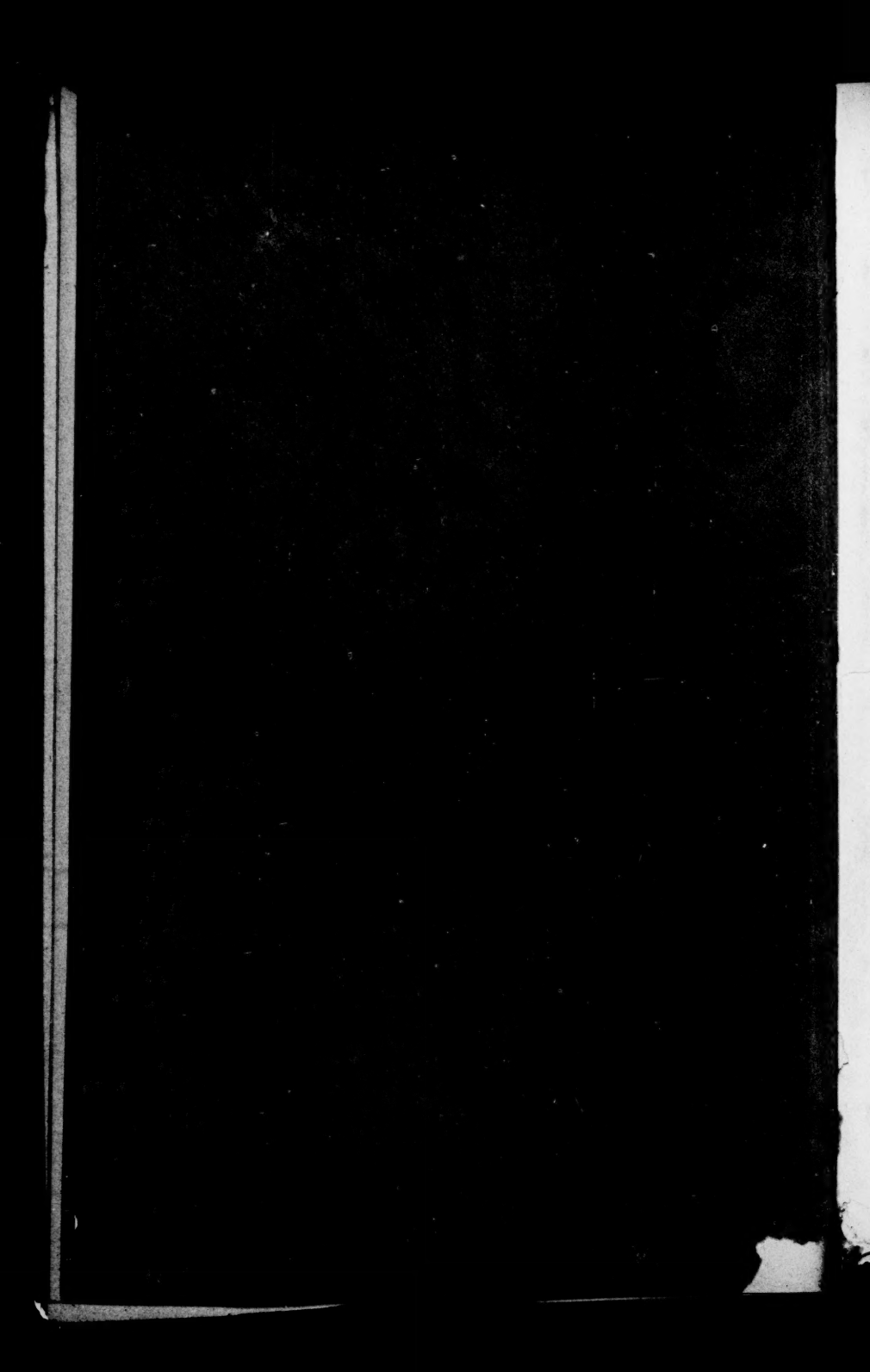
THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

OWEN O'HARE.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 12, 1883.



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INDEX.

	Original.	Print.
Petition, filed July 23, 1880	1	1
Traverse, filed October 9, 1880	11	6
Set-off, filed December 2, 1881	12	6
Bill of particulars, filed December 2, 1881	13	6
Special plea by defendant, filed December 2, 1881	14	7
Replication to set-off, filed December 31, 1881	16	8
Motion to strike out special plea by claimant, filed December 31, 1881	18	9
Replication to defendant's plea to reform contract, filed March 19, 1883	19	10
Findings of fact and conclusion of law	21	10
Opinion of the Court	39	36
Final judgment	45	41
Application of defendant for and allowance of appeal	47	41
Certificate	48	42

1 I.—*Petition.*—*Filed July* 23, 1880.—*A. H.*

In the Court of Claims.

OWEN O'HARE
vs.
THE DISTRICT OF COLUMBIA. } No. 24. Filed July 23, 1880.

The petition of Owen O'Hare respectfully represents:

First. That he is a citizen of the District of Columbia, and resides in the city of Washington, No. 2019 I street, N. W.

Second. That "The District of Columbia" was created a government by that name and constituted a body corporate for municipal purposes with power (among other things) to contract and be contracted with and sue and be sued by an act of the Congress of the United States entitled "An act to provide a government for the District of Columbia, approved February 21st, 1871, and revised as found in the "Revised Statutes of the United States relating to the District of Columbia," approved June 22nd, 1874. (16 St. at Large, pp. 419 to 429; Rev. St. D. C., p. 1–30.)

Third. That the provisions of said laws have been from time to time modified by acts of Congress, especially by an act entitled "An act for the government of the District of Columbia and for other purposes," approved June 20th, 1874, and by an act entitled "An act providing a permanent form of government for the District of Columbia," approved June 11th, 1878. (18 St. at Large, part 3, pp. 115–121 20 St. at Large, pp. 102–108.)

2 Fourth. That while the first two of these laws provided for a "Board of Public Works," to which was committed the care and control of streets, avenues, alleys, sewers, and other public works, the act of June 20th, 1874, abolished that Board and provided for the appointment of three commissioners with the powers as respects public improvements, which had been possessed by said Board, except as modified by said act, and the act of June 11th, 1878, continued the said office of commissioners, with the functions therein mentioned.

Fifth. That the Congress of the United States at its last session passed an act entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes," approved June 16th, 1880, and that your petitioner has a just, legal, and equitable claim against said District as hereinafter stated.

Sixth. That between August, 1873, and January, 1874, your petitioner entered into contracts with the late Board of Public Works, then in existence, for the performance of authorized work within said District, as embraced in contracts hereafter mentioned, and under said contracts by the direction and under the supervision of said District, its regular agents and employees, performed a large amount of work beneficial to said District, and to its satisfaction, all of which was accepted and received by said Board of Public Works acting for and representing said District.

Seventh. That the contracts so made as aforesaid with your petitioner by said Board of Public Works and executed as aforesaid were numbers 835, 849, 881, and 990 of the series of contracts made by said Board.

3 Eighth. That contract No. 835 was for the construction of sewers in the city of Washington, including excavation, laying pipe, building manholes and traps and extensions of laterals, and other work. That by the terms of said contracts as originally executed your petitioner was to receive for the excavations forty cents per cubic yard in lawful money of the United States.

Ninth. That contract No. 835, which embraced a large amount of work, was on the 18th of October, 1873, modified so as to increase the prices twenty per centum, as will more fully appear by a copy of said modification as hereto annexed and made part hereof, and marked Exhibit A.

Tenth. That after the abolition of the Board of Public Works the Commissioners of said District, acting under authority conferred on them by the Congress of the United States in the year of 1875, extended, by instruments of writing executed by them and your petitioner, said original contract with the Board of Public Works and the modification thereof, so as to include other and additional work both in the city of Washington and Georgetown in said District, such as the construction of sewers, laying pipes, grading and paving alleys, setting curbstones, laying brick pavements, and paving carriage-ways.

Eleventh. That your petitioner performed the work provided for in said extended contracts, as well as work incidental and necessary thereto, prior to March 14th, 1876, under the direction of said Commissioners, and to their satisfaction, and all of said work was accepted by them for and in behalf of said District, and for the use, purposes, and benefit thereof.

Twelfth. That your petitioner is unable to state in detail the work done by him, or describe fully its locality, or give the exact quantities, because the contracts and specifications are under the control of the Com-
4 missioners of said District, who, upon his application, have refused to allow your petitioner or any one for him, access to them, or to furnish copies thereof, or give any information in relation thereto; and because, while the said District, through its agents and employees, have measured the work done by your petitioner as aforesaid, at least in parts, and while the said District has accounts thereof and of payment made to your petitioner and vouchers in relation thereto, which are necessary to a particular statement of his claim, the said Commissioners refuse to permit your petitioner, or any one for him, to see or in any way examine said measurements, accounts, and papers connected therewith, notwithstanding his application therefor as aforesaid.

Thirteenth. That there has been no final settlement between your petitioner and said District for the work done by him; and while without access to the contracts, specifications, measurements, and papers under the control of the Commissioners of the said District your petitioner cannot present exact particulars and items of the amount unsettled and remaining due him, according to his knowledge, information, and belief it amounts to eighteen thousand one hundred and ninety-seven dollars and seventy-five cents ($18,197.75) under extensions of contract No. 835, including excavations for sewers and construction thereof, setting curbs, constructing alley traps, water-pipe, and fire-plugs, and lowering water-mains, hauling stones for curbs and other works; and six hundred and ninety-three dollars and forty-four cents ($693.44) for excavation for sewers under exten-

sion of contract No. 849; and one hundred and eighty-seven dollars and twenty cents ($187.20) under contract No. 881 for excavation for sewerage; and one hundred and twelve dollars ($112.00) under contract No. 990 for excavation for sewerage; also $1,737.70 for laying water-
5 mains and doing other work on and in connection with the water service of said city of Washington, and material provided therefor, as set forth in a bill of particulars thereof attached hereto as part hereof, marked Exhibit B, with interest thereon at the rate of six per cent. from the respective dates of the completion and acceptance of said work, which he is unable to state with accuracy for the reason already given herein.

Fourteenth. That no part of your petitioner's said claim for said work has been rejected by the late Board of Audit, which was created and existed under and by virtue of sec. six of this act of June 20th, 1874, entitled "An act for the government of the District, and for other purposes."

Fifteenth. That for the work done under the contracts extended by the said Commissioners, and for which compensation is herein claimed, it was provided that payment should be made in bonds issued by the sinking-fund commissioners, under and by virtue of section seven of the said act of Congress, approved June 20th, 1884, and that said bonds should be accepted and received in payment for said work at their par value.

Sixteenth. That neither the said contracts, nor the extensions thereof, nor the accounts or amounts due for work thereunder, have been assigned or transferred to any persons or persons, but your petitioner retains his right and interest in the same as it originally existed, and that your petitioner is justly entitled to the amount herein claimed, viz, twenty thousand nine hundred and twenty-eight dollars and nine cents ($20,928.09), with interest thereon as aforesaid; and that at all times your petitioner has borne true allegiance to the Government of the United States, and that he has not in any way voluntarily given encouragement to rebellion against
6 the said Government. And your petitioner says that he believes the facts as stated in this petition to be true.

Seventeenth. Your petitioner further represents that he has herein set forth his claim as specifically as he is able to do without having access to the contracts, accounts, measurements, and vouchers in the possession of the Commissioners of the District of Columbia, and if a more particular statement of the claim shall be deemed necessary, he sets forth the following as the papers or copies thereof which he needs to enable him to specify the claim with more particularity, viz:

First. Contract No. 835 as made between the Board of Public Works and your petitioner.

Second. The modifications of said contract in relation to prices made as aforesaid.

Third. The several extensions of said contract No. 835 as made between the Commissioners of the District of Columbia and your petitioner.

Fourth. The original contract, No. 849, as made between the Board of Public Works and your petitioner.

Fifth. The several extensions of said contract No. 849 as made between the Commissioners and your petitioner.

Sixth. Contract No. 881 as made between the Board of Public Works and your petitioner.

Seventh. The several extensions of said contract, No. 881 (if any) as made between the Commissioners of said District and your petitioner.

Eighth. Contract No. 990 as made between the Board of Public Works and your petitioner.

Ninth. The several extensions of contract No. 990 (if any) as made between the Commissioners of said District and your petitioner.

7 Tenth. The measurements made by the engineer of said Board of Public Works, or its proper officer, of all works done by your petitioner under said original contracts.

Eleventh. The measurements made of work done by your petitioner and accepted by the said District under the several extensions of the contracts hereinbefore mentioned.

Twelfth. All vouchers for work done under the original contracts with the Board of Public Works.

Thirteenth. All vouchers for work done under the several extensions of said contracts made with the Commissioners of the said District.

Fourteenth. All other papers, memoranda, or data in any way connected with said contracts or the performance of the work thereunder by petitioner.

Fifteenth. All other papers, memoranda, or data in any way connected with the several extensions of said contracts or the work done thereunder by your petitioner.

Prayer.

1. Your petitioner therefore prays for judgment in due form of law against the said District of Columbia for the said sum of twenty thousand nine hundred and twenty-eight dollars and nine cents, with interest thereon as aforesaid.

2. That the said District of Columbia may be required by a proper order to furnish petitioner with the papers set forth in the seventeenth paragraph of this petition, or produce the same in court.

3. And he prays for such other relief as he may be entitled to, and as in duty bound he will ever pray, &c.

OWEN O'HARE.

WILLIAM A. COOK,
Att'y for Owen O'Hare.

8 DISTRICT OF COLUMBIA,
Washington County, to wit:

Owen O'Hare, being duly sworn, says upon oath that he has heard the foregoing petition read, and knows the contents thereof, and that the matters and facts set forth in said petition by him subscribed are true.

OWEN O'HARE.

Subscribed and sworn to before me this 22d day of July, 1880.

A. C. RICHARDS,
Notary Public.

EXHIBIT A.

Contract 835. It is hereby agreed this contract, with its various terms, conditions, and stipulations, except as respects the time of execution, shall be modified, extended, so as to embrace an increase of twenty per centum upon the prices in the foregoing contract.

ALEXANDER R. SHEPHERD,
H. A. WILLARD,
JAMES A. MAGRUDER,
ADOLPH. CLUSS,
JOHN B. BLAKE,
Board of Public Works.

Witness:
F. M. JOHNSON.
JOHN A. HURLEY.

OCT. 18TH, 1873.

EXHIBIT B.

District of Columbia to Owen O'Hare, Dr.

To contract work done for the District of Columbia by order of
9 the Board of Public Works and Water Register.

1873.			
Sept. 4.	To laying 8,003 ft. 6-in. water-main on H st. N. E., from 1st to Boundary, at 30c. per foot	$2,400	90
	To laying 590 feet of 6-in. water-main on 8th st. N. E., from G to H, at 30c. per foot	177	00
	To laying 1,194 ft. of 6-in. water-main on 9th st. N. E., from H to F, at 30c. per foot	358	20
	To laying 1,248 ft. of 6-in. water-main on 10th st. N. E., from H to F, at 30c. per foot	374	40
	To putting in 14 stop-cock boxes and covers on H st., from 1st st. to Boundary, and hauling the same, at $10 each	140	00
	To putting in 1 stop-cock and cover on 8th st. N. E., and hauling the same, at $10	10	00
	To putting in 2 stop-cock boxes and covers on 9th st. N. E., and hauling the same, at $10	20	00
	To putting in 2 stop-cock boxes and covers on 10th st. N. E., and hauling the same, at $10	20	00
	To setting 10 fire-plugs, at $5 each	50	00
	To putting in 10 cast-iron branches for fire-plugs, at $2.50	25	00
	To extra work done by change of grade, cutting out main and resetting fire-plug 3d and H	15	00
	To cutting out main and resetting fire-plug 5th and H st	15	00
		3,605	50

	Amount forward	$3,005 50
	To resetting stop-box 2nd and H st. N. E	3 50
10	To resetting stop-box 2nd and H st. N. E	3 50
	To hauling 10,035 feet of 8-in. water-main, on H st. N. E., at 5c per foot	501 75
	To 2,248 cubic yards of excavation caused by change of grade on H st. N. E. in the performing of the laying of said water-mains, at 40 cents per cubic yard	899 20
		5,013 45
1873. Oct. 2.	By credit in certificates	3,275 75
	To balance due	1,737 70

11 II.—*General traverse.*—*Filed Oct.* 9, 1880.

And now comes the Attorney-General, on behalf of the District of Columbia, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Assistant Attorney-General.

12 III,—*Set-off.*—*Filed Dec.* 2, 1881.

And now comes the Attorney-General, on behalf of the District of Columbia, and for a further plea says:

That at and before the institution of this suit the said claimant was and still is indebted unto the District of Columbia in the full and just sum of $13,092.18 for money had and received to the use of the defendant, and the said claimant being so indebted as aforesaid, in consideration thereof promised to pay the defendant the said sum of money on request; yet the said claimant, although often requested so to do, hath not, nor hath any one in his behalf, as yet paid the same sum or any part thereof, but hath wholly neglected and refused, and still neglects and refuses, so to do; which said sum so due as aforesaid the defendant claims to set off against the demand of the claimant, and thereupon he brings his counter-claim.

THOMAS SIMONS,
Assistant Attorney-General.

13 IV.—*Bill of particulars of set-off.*—*Filed Dec.* 2, 1881.

To the following overpayments on account excavation of sewer trenches in excess of the amount actually excavated	$2,639 00
To overpayments on account of caving of sewer trenches, such risk being chargeable to contractor, as per article 6 of contracts	681 75
To overpayments on account of allowance of 20 per cent. increase on work, not embraced within the terms of such increase	1,007 82

To overpayments on excavation of sewer trenches in excess of contract rates (payments at 50 cents in lieu of 40 cents)...		821 30
To overpayments for shoring, such work being required by specification XIII to be done without additional charge...		5,929 89
To overpayments for hauling water-mains to H street, the same having been included in the price per linear foot for laying said mains.....		703 35
To overpayments for taking up brick pavements on H street, over water-service connections, the same having been included in the price per linear foot for water services		$301 20
To overpayments for sewer in alley, square 420, arising from not deducting partial payment on voucher 14090 from final settlement on voucher 14086		399 92
To overpayment for sewer in alley, in square 421, by error in measurement, as follows: Paid for 492 feet (see voucher 14086), actual length 450 feet, as per measurement sheets; overpayment, 42 feet, at 88 cents		36 96
To 42 linear feet of excavation, at 88 cents; cubic yard to foot, at 40 cents		14 28
To 20 per cent. added on above overpayments		10 24
Also overpayment arising from omission to deduct partial payment, 14090, from final payment, voucher 14086.....		115 80
To materials on line of work not accounted for, 177 cubic yards of cobble-stone, at $1.....		177 00
To error in computation on voucher 19507, viz:		
2,070.7 yards of excavation, at 40 cents, carried out as	$908 28	
correct extension	828 28	
		80 00
To cost of cleaning alley in square 398 (required by specification 16).....		49 06
To deduction for inferior work on Stoddart street, Georgetown, condemned by engineer.....		124 61
		13,092 18

THOMAS SIMONS,
Assistant Attorney-General.

14 V.—*Special plea.—Filed Dec'r* 2, 1881.

EQUITABLE PLEADING PRAYING REFORMATION OF AMENDMENT, CONTRACT 835.

Now comes the Attorney-General, on behalf of the District of Columbia, and, for further plea in this behalf, says:

That heretofore, about the 12th day of August, A. D. 1873, the claimant entered into a certain written contract with the Board of Public Works, numbered in the series of contracts made by said Board as No. 835, which contract provided for the "excavating for, construction, and completion of certain pipe-sewers in certain streets and alleys in the District of Columbia," all of which will more fully appear by reference to the said contract

filed in this cause by the Commissioners of the District of Columbia, in answer to a rule of the court, issued on the application of the claimant, and which contract is sued on by the claimant in this proceeding.

That afterwards, and on or about the 13th day of October, A. D. 1873, and while the claimant was performing the work in the alleys specified in the contract, he addressed a written communication to the Board of Public Works, requesting that the prices be increased on his contract for sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446, representing that, by reason of the narrowness of the said alleys, he was unable to pile the earth excavated from the trenches in said alleys, but was obliged to haul it away and then haul the same back to refill the trenches; and, by reason of this fact, the building of the sewers in the above specified alleys required much extra expense, and more than double the time that it would take to do similar work on the streets.

That thereupon said request was considered by the Board of Public Works, and they agreed to increase the price for sewering the said alleys 20 per centum, and so informed the claimant in writing, and by written order directed their engineer to amend said contract so as to increase the price of sewering in the said specified alleys 20 per centum; said engineer, by written order, directed the contract clerk to amend the said contract so as to increase the price of sewering in the said specified alleys 20 per centum; but the defendant avers that the contract clerk, in writing said amendment, by mistake neglected to confine the increase of 20 per centum to the work of sewering the said specified alleys, as by said written order he was
15 directed to do, and as was the intention and object of the said claimant and Board of Public Works, but by error omitted from said amendment the words of limitation contained in said written order, and by reason of such omission the said amendment appears to increase the price for all the work mentioned in the said contract in lieu of the alley work only, contrary to the intention and meaning of the said parties thereto; which error and omission was not discovered until after said amendment had been signed.

The defendant avers that said amendment of contract, of date October 18, 1873, and designated as "extension of contract No. 835," does not express the true agreement and intention of the parties thereto, and that the same ought to be reformed.

The defendant prays, therefore, that the court, in the execution of its equity jurisdiction under the terms of the act of June 16, 1880, may reform the said contract so that it shall express the true intent and meaning of the agreement made by the said parties, to wit, by adding after the words "so as to embrace an increase of 20 per centum upon the prices in the foregoing contract" the words of limitation following, viz, "for sewering in alleys in squares numbered 397, 398, 420, 421, 422, 444, 445, and 446."

THOMAS SIMONS,
Assistant Attorney-General.

16 VI.—*Replication to set-off.—Filed Dec'r* 31, 1881.

And now comes the said claimant, by Cook & Cole, his attorneys, and for replication to the defendant's plea of set-off says that he ought not to

be barred of his said suit and claim against the said defendant or any part thereof, by reason of anything set forth in said plea of set-off, because he says that he never was indebted to the said defendant in the said sum of $13,092.18, or any other sum whatever, and never promised to pay the said defendant said sum, or any part thereof, or any sum whatever.

COOK & COLE,
For Claimant.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

Owen O'Hare, the claimant in the foregoing suit, being duly sworn, says upon oath that he is not and never was indebted to the District of Columbia in the sum of $13,092.18 set forth in the plea of set-off filed by the defendant in this cause, or any part thereof, except $80.00, an error in calculation, mentioned in the specifications of set-off filed with said plea, which defendant believes is an error in calculation. But as to all
17 the other items mentioned in said specifications of set-off filed with said plea he denies the same and says that the defendant is not entitled to the same or any part thereof; that he never was overpaid on account of excavation, caving, or on account of allowance of 20 per centum increase on work not embraced in contract No. 835; or on account of shoring or for hauling water-mains; or for taking up brick pavements on H street; or on account of overpayments arising from not deducting partial payments; or by error in measurement. Nor is said defendant entitled to charge against or recover from him anything on account of clearing alley in square No. 398, or for inferior work on Stoddart street, in Georgetown, as set forth and specified in the said specifications of set-offs, or otherwise. Nor did he ever promise to pay the said District the said sum of $13,092.18, or any part thereof, as alleged in said plea of set-off.

OWEN O'HARE.

Subscribed and sworn to before me this 27th day of December, 1881.

A. C. RICHARDS, [SEAL.]
J. P. & Notary Public.

18 VII.—*Motion to strike out equitable plea.—Filed Dec'r* 31, 1881.

And now comes the claimant, by Cook & Cole, his attorneys, and moves the court to strike out the plea of the defendant, styled by the Attorney-General "an equitable pleading, praying reformation of amendment contract No. 835" on the following grounds:

1st. That the court has no jurisdiction to grant the relief sought by said plea.

2nd. That if it possessed such jurisdiction, the same cannot be exercised in this case.

3d. That the matters set forth in said plea are not properly pleaded.

4th. That the said matters, even if true, which is denied, are not sufficient to warrant the granting of the relief sought.

COOK & COLE,
Atty's for Claimant.

19 VIII.—*Replication to plea to reform contract.—Filed Mar.* 19, 1883.

Replication to defendant's plea, praying the reformation of contract No. 835.

And now comes the claimant, by Cook & Cole, his attorneys, and for replication to the said plea, says that the court has no power or authority to reform the said contract as in and by said plea is prayed.

And for further replication, he says that the facts set forth in said plea are insufficient to justify or require the reformation of said contract.

And for further replication to said plea, he says that the stipulation of the 13th day of October, 1873, providing for an increase of prices in said contract of 20 per centum was not made by error or mistake of the contract clerk or any one else in preparing it; and that the reasons recited in said plea were not the only ones existing at the time for the increase of said prices, but that another reason then existed therefor, to wit, the failure of said Board of Public Works to pay cash for said work as specified in said contract; and that the certificates issued by them for said work were greatly below par, and this reason operated upon the minds of both
20 parties to said agreement of the 13th day of October, 1873; and that before the making and signing of said contract or agreement, it was agreed and understood by both parties thereto that the 20 per centum increase should extend to all the work embraced in said contract, and there was no error in the making thereof, and the same as written expresses the true contract and agreement between the parties.

OWEN O'HARE.

DISTRICT OF COLUMBIA,
Washington County, to wit:

Owen O'Hare, being duly sworn, says, upon oath, that he has heard the foregoing plea read and knows the contents thereof, and that the matters therein set forth stated upon his own knowledge are true, and those therein stated upon information he believes to be true.

OWEN O'HARE.

Subscribed and sworn to before me this 7th day of May, 1883.

JOHN RANDOLPH,
Ass't Cl'k, Court of Claims.

21 IX.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Contract No. 835.

This contract made and concluded this twelfth day of August in the year one thousand eight hundred and seventy-three, by and between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, Adolf Cluss, and Henry A. Willard, constituting and composing the Board of Public Works

of the District of Columbia of the first part, and Owen O'Hare, of Washington, D. C., of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, to furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner to excavate for, construct, and complete pipe sewers, with the necessary man-holes and traps, in the following alleys and streets in the city of Washington, D. C., to wit:

An eighteen (18) inch pipe sewer on the east side of Ninth street NW., from Rhode Island avenue to Q street NW.; thence a fifteen (15) inch pipe sewer along the north side of said Q street NW., to a point opposite alley on square numbered three hundred and ninety-seven (No. 397), and thence across said Q street and alongside alley to a point ten (10) feet inside of the building line; thence a twelve (12) inch pipe sewer along said alley in said square numbered three hundred and ninety-seven (No. 397) to P street NW., and across said P street NW. to alley in square numbered three hundred and ninety-eight (No. 398), and also said alley in said square numbered three hundred andninety-eight (No. 398), and along said alley in said square numbered three hundred and ninety-eight (No, 398) to Q street NW. (as per accompanying diagram).

Also a fifteen (15) inch pipe sewer, beginning at the opening of alley in square numbered four hundred and twenty (No. 420), and running along said alley to the south side of Q street NW.; thence a twelve (12) inch pipe sewer along alley in square numbered four hundred and twenty-one (No. 421) to P street NW., and across P street NW. to alley in square numbered four hundred and twenty-two (No. 422), and running along said alley in square numbered four hundred and twenty-two (No. 422) to O street NW. (as per accompanying diagram).

Also a twelve (12) inch pipe sewer in square numbered four hundred and forty-six (No. 446), beginning at opening of west alley in said square numbered four hundred and forty-six (No. 446), and along said west alley in said square numbered four hundred and forty-six (No. 446), to O street NW. (as per accompanying diagram).

Also a fifteen (15) inch pipe sewer, beginning on R street NW. at a point opposite the east alley, in square numbered four hundred and forty-four (No. 444) and running across said R street NW. to the opening of said east alley in said square numbered four hundred and forty-four (No. 444), and along said east alley in said square, with twelve (12″) inch laterals along the two (2) cross alleys connecting with said east alley in said square to Q street NW., and across said Q street NW. to opening of east alleyin square numbered four hundred and forty-five (No. 445) to first cross-alley in said square, and thence a twelve (12″) inch pipe sewer along said east alley in said square with twelve (12) inch laterals in the two (2) cross-alleys connecting with said east alley in said square numbered four hundred and forty-five (No. 445) to P street NW., and across said P street NW. to opening of east alley, in square numbered four hundred and forty-six (No. 446), with twelve (12) inch laterals in the thirty (30) foot alley running west from said east alley, and connecting with said east alley in said square

numbered four hundred and forty-six (No. 446) to O street NW. (as per accompanying diagram).

22 Also twelve (12) inch pipe sewers on the south side of P street, NW., from the west building line of Sixth street, NW., to the east building line of Seventh street, NW.; and from the west building line of Seventh street, NW., to the east building line of Eighth street, NW.; and from the west building line of said Eighth street, NW., to the east building line of Ninth street, NW.; and from the west building line of said Ninth street, NW., to the east building line of Columbia street, NW.; and from the west building line of said Columbia street, NW., to the east building line of Tenth street, NW. (as per accompanying diagram).

Also twelve (12) inch pipe sewers on the south side of Q street, NW., from the west building line of Sixth street, NW., to the east line of thirty (30) foot alley, in square numbered four hundred and forty-five (No. 445), and from the west line of said thirty (30) foot alley in said square to the east building line of Seventh street, NW., and from the west building line of said Seventh street, NW., to sewer in alley in square numbered four hundred and twenty-one (No. 421) (as per accompanying diagram).

Also, a twelve (12) inch pipe sewer in alley in square numbered three hundred and twelve (No. 312), the said sewer to connect with the sewer in P street, NW.

The said sewers as aforesaid to be constructed and completed in accordance with the specifications following, to wit:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA.

Specifications for brick masonry and sewers.

(1) All the materials furnished and all the work done, which, in the opinion of said Board of Public Works shall not be in accordance with this specification, shall be immediately removed, and other materials furnished and work done that will be in accordance therewith.

(2) In the construction of the brick masonry none but the very best quality of whole bricks, burnt hard entirely through, free from cracks, and with true, smooth faces, shall be used, and which are to be thoroughly wet immediately before being laid. Every brick is required to have full cement joints under bottom, sides, and ends, which for each brick is to be formed at one (1) operation, and in no case is to be made by working in the cement after the brick is laid; every other course of brick to be laid with a line. The bricks to be culled as they are brought upon the ground, and all brick of an improper quality, and all bats immediately removed from the same. The cement mortar is to be composed of the best quality of fresh hydraulic cement, mixed in the proportion of one barrel of cement (of 300 pounds) to two (2) barrels, not packed, of clean, sharp, silicious sand, free from loam.

(3) The work under this agreement is to be prosecuted at and from as many different points in such part or parts of the streets and avenues on the line of the work as the said Board may, from time to time, during the progress of the work, determine, at each of which points an inspector will be placed to supervise the same, whether such work be connected with the sewer, with the receiving-basins, or with the culverts.

(4) The sewers and culverts to be of circular vitrified Scotch stoneware sewer-pipe, or pipe equal thereto, of the dimensions shown on the plan of the work, which will be furnished to the contractor by the said Board at their yards. There will be: lineal feet inch straight pipe; lineal feet inch curved pipe; lineal feet inch straight pipe with six-inch spurs; lineal feet inch straight pipe; lineal feet inch curved pipe; lineal feet inch straight pipe with six-inch spurs; lineal feet, branches inches by inches; lineal feet, branches inches by inches; lineal feet, branches inches by inches; lineal feet, branches inches by inches; lineal feet, branches inches by inches; lineal feet, branches inches by inches.

The joints to be properly fitted with bands or sleeves, and wiped or pointed, inside and outside, with cement mortar as the pipes are laid. If necessary (which the engineer in charge of the work will determine), the sewer-pipes and culverts will be firmly supported at each side of the joints by a foundation plank two (2) inches thick, six (6) inches wide, and two (2) feet long, laid under and transversely with the line of the pipes, for which plank, as well as for the plank used in the foundation for the brick sewer, there will be allowed and paid a sum per thousand feet, b. m., to be determined by the Board. The refilling of the trench under and on each side of the pipes when laid, and to a height of at least one (1) foot above the outer surface of the same, will be of earth or sand, entirely free from stones or rubbish, thoroughly compacted by ramming with tools made for this purpose, in layers of not more than four (4) inches, as the filling progresses. The remainder of the trench is to be refilled and rammed as provided in specification 15. Lateral spurs, for six (6) inch house connections, are to be laid in front of each building on the line of
23 the work at such points as said Board may designate; and where buildings are not erected they will be laid at such points as the Board may direct. The spurs are to be securely closed with approved vitrified-ware covers.

(5) The sewers are to be built of the dimensions, with the connections on the lines, and at the depth shown on plans or furnished by the engineer. The connections with present sewers to be made in a workmanlike manner. All curves to have each a radius of not less than thirty (30) feet. The ends of all sewers (except at their discharge) to be securely closed with brick masonry or approved stone ware covers.

(6) Brick man-holes to be worked at such places in the line of the sewer as the engineer may direct, according to the plans furnished by the engineer. A cast-iron man-hole head and cover, free from imperfections and thoroughly cleaned, and in dimensions, weight, and quality of iron, and in all respects similar to the pattern to be furnished by the engineer, similar to those now in use in Washington, is to be fitted to each of the above described man-holes.

(7) Receiving basins are to be built where shown on the plan of the work, or at such other place or places, and at such time as the Board may, during the progress of the work, from time to time determine. The basins to be on the circular corners or side of the street, as the said engineer shall direct, and to be constructed in accordance with the drawings to be seen at the office of said engineer; each portion of the basins to be of the size

and material designated on drawings. The weight, size, and shape of the covers of the receiving basins to be similar to the pattern now in the office of the said engineer. The whole to be laid in cement, and the joints to be struck on the whole of the inner sides. In case the nature of the ground be such that, in the opinion of the said engineer, timber ought to be substituted for the stone foundation, as shown on the said model, the timber shall be furnished, and the foundation built of the proper thickness and size, without additional charge, by the said contractor.

(8) The culverts for the connection of the receiving basins are to be constructed of the same material as the pipe sewers and laid in like manner.

(9) New sewers and house connections.—The said Board shall have the right to connect any sewer or sewers with the sewer herein described, or to grant permits to any person or persons to make house connections therewith at any time before it is finally completed; and said contractor shall not interfere with or place obstructions in the way of such persons as may be employed in building such new sewer or sewers, or in making such connections; no extra allowance will be made to the aforesaid contractor on account thereof.

(10) Rebuilding of culverts and house connections.—In case the line of this sewer shall intersect with any culverts now built, so much of said culverts, as in the opinion of said Board may be necessary, shall be taken up and rebuilt to and connected on a proper curve with said sewer. In case the lines of the proposed work shall intersect with any sewer connections for which permits may have been previously granted by said Board, the same shall be extended to and reconnected with new work as it progresses in the manner and of the materials allowed by said Board under their rules and regulations relative to sewer connections.

(11) Of passage-ways and rail tracks.—All the paving and macadamization stones necessary to be removed, together with all rock, earth, or sand taken from the trenches, shall be placed in such parts of the carriageway, or the vicinity thereof, as the inspector in charge of the work shall direct, and in all cases a passage-way on the sidewalks of not less than three (3) feet in width shall be preserved free from all obstructions. In the progress of the work the contractor will be required to preserve from needless obstruction the carriageway on one side of the line of the proposed work, and also to afford the necessary facilities to the company or companies owning rail tracks on the line of the work, or their agents, in their preservation of the same from injury, either by removal or otherwise, without extra charge therefor. In case it be necessary to remove the said tracks, or any portion thereof, the said company or companies will be notified by the Board to remove the same within a specified time, and the contractor shall not interfere with the said tracks, or any portion thereof, until the expiration of the time specified in said notice.

(12) The trenches, except where fast rock may be encountered, to be at least ten (10) inches on each side wider than the outer width of the masonry; in rock excavation the trenches to be excavated to the width allowed in the measurment of rock excavation. In no case shall the trench be opened more than one hundred (100) feet in advance of the complete building of the sewer unless permission in writing so to do shall have been given by said engineer. In all cases of rock-blasting the ordnance laws or regulations relative to rock-blasting to be strictly observed, and the

material so excavated to be immediately removed from the street. Where a line of main water-pipes intersects the line of the trench the rock necessary to be excavated for a width of five (5) feet in the clear on each side of the main pipe is in all cases to be removed without blasting.

(13) Sheet-piling to be used where the same may be necessary,
24 but no allowance will be made therefor. In all cases the sheet-piling is to be drawn as the work progresses, unless ordered otherwise by the said Board, in which case the sheet-piling so ordered to be left in the trench will be measured and allowed for at the same rate as the foundation plank.

(14.) The refilling in all cases shall be either earth, gravel, or sand, of wholesome quality, and in case of deficiency in the earth or sand taken from the trenches the contractor shall furnish a sufficient quantity of sand or gravel to properly fill the trenches without extra charge. In refilling, the earth or sand to be well and faithfully rammed, in layers of not more than nine (9) inches as the work progresses.

(15.) Regrading and repairing.—The carriageway on the line of the work to be regraded and repaved or remacadamized, as the case may be, to the extent to which the aforesaid work may render necessary. The said contractor will be required to reset all curb, gutter-bridge, and flagstones, which may have been displaced during the prosecution of the work under this agreement; and in case any of said stones shall have been broken, in consequence of any act or omission on the part of the said contractor or his agents, new stones, to be approved by said Board shall be furnished and set in place thereof by said contractor at his own expense prior to the acceptance by said Board of the work aforesaid as completed.

(16) In repaving the paving stones for a width of not less than sixteen (16) feet over and adjoining the line of the sewer, shall be taken up and bedded endwise in good, clean gravel, twelve (12) inches in depth, in a good and workmanlike manner. The repavement, after it has been examined and approved of by the engineer, to be covered with pure sand one (1) inch in thickness, and no more. Twelve (12) days after the completion of the whole work the covering sand shall be swept into heaps and removed from the street; and until this be done, the certificate of the engineer to the effect that the stipulations relative to the removal of all surplus materials, earth, sand, and rubbish, from the line of the work, have have been complied with shall have been obtained and filed in the office of said Board, the work will not be considered as completed according to this agreement. In remacadamizing or repaving the same will be done in accordance with the work of the street before the sewer was commenced.

(17) All the cross-gutters which may become unnecessary in consequence of the construction of any receiving bases under this agreement are to be taken up, and the whole of the intersections between the cross-walks regraded in conformity with the grade of the street, and repaved in the manner before described.

(18) Engineer's certificate.—The whole of the regrading and repaving or remacadamizing is to be done to the satisfaction of the engineer (which shall be determined by a certificate to that effect, signed by him and filed in the office of the Board) and the same kept in good repair for a period of six (6) months from the date of the last said certificate.

(19) Cleaning up, &c.—The basins and culverts to be thoroughly cleaned out and left clean. Upon the completion of the work embraced in this

agreement, a certificate, signed by the engineer, to the effect that the stipulations relative to the removal of all surplus materials, earth, sand, rock, and rubbish from the line of the work have been faithfully complied with, will be filed in the office of the Board.

(20) All iron, water, and gas pipes which it becomes necessary to remove shall be considered as the property of the Board, and left in such part of the street as the inspector may direct, unless notice to the contrary is given by the Board in writing to the said contractor, in which case the same shall be removed or otherwise disposed of at the expense of said contractor.

(21) All loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen or unusual obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, will be sustained by the contractor.

(22) In measuring rock excavations a width of four (4) feet at a point six (6) inches below the outer bottom of the brick and pipe sewers and culverts will be allowed; from this point a slope of three (3) inches to one (1) foot on each side of the excavation will be allowed until the surface of the rock is reached, and no more.

(23) Suspension of masonry during winter.—All work in masonry to cease positively, on the first day of December, in each year, and not to be resumed until such time next thereafter as shall be designated by the Board. Upon the suspension of mason work, as before mentioned, the trenches to be refilled and repaved, or remacadamized, as the case may be; and all materials, surplus earth, sand, rock, and rubbish removed from the street immediately thereafter. The inspectors will be retained on the work until the same shall be so done, and receive pay in the same manner as if the work was in progress, which shall be charged to the contractor for the time the work may be unnecessarily delayed.

(24) Connections not to be made without permission.—The work aforesaid will not be considered as completed in accordance with this agreement, and therefore will not be received, in case any connections or drains are made and joined therewith without permission in writing being obtained from the Board prior to the commencement of the construction of such connections or drains.

(25) Wherever the word "Board" or "Board of Public Works," and pronouns in place thereof, are used in this contract they are to be considered as referring to the party of the first part of this contract.

(26) Wherever the word "engineer" or "engineers," or the pronouns referring thereto, are used in this contract they are intended to designate the chief engineer of said Board and the assistant acting under him.

(27) Wherever the word "contractor" and the words "party of the second part," and the pronouns in place thereof, are used in this contract they are to be considered as referring to and meaning the party or parties (as the case may be) of the second part to this agreement.

(28) And the said party of the second part hereby further agrees that the said parties of the first part shall be, and they are hereby, authorized to retain, out of the moneys payable to the said party of the second part under this agreement, the certain sum of ten (10) cents for each lineal foot of sewer constructed under this agreement, and to expend the same in the manner hereinafter provided for in making such repairs to the carriageway on the line of said sewer as the said Board may deem necessary.

(29) And it is further agreed that if, at any time during the period of six (6) months from the date of the final completion of the sewer aforesaid, the carriageway on the line of the same shall, in the opinion of the said Board, require regrading and repaving or remacadamizing, and the said Board shall notify the said party of the second part to make the repairs so required, and if the said party of the second part shall neglect to make such repairs to the satisfaction of the said Board within twenty-four (24) hours from the date of the service of such notice, that then the said Board shall have the right to employ such other person or persons as they may deem proper to make the same, and to pay the expenses thereof out of the said certain sum retained for that purpose by the said parties of the first part, as before mentioned.

(30) And the said party of the second part further agrees that he will purchase and receive from the said Board the whole of the sewer and culvert pipes required for the construction of the work herein described, and that he will not sell or otherwise dispose of the said pipes, or any of them so purchased by him, but will use the same exclusively in the construction of the work last aforesaid. He further agrees that he will pay for the said pipes, at the price established by the Board for the same, in current funds, at the time or times they may be ordered by him; and he further agrees that he will be at all charges for loading said pipes at the yards of the said Board, and of hauling the same to the line of the proposed work.

(31) And the parties of the first part hereby agree, upon the expiration of the said period of six (6) months, provided that the said carriageway shall at that time be in good order, which fact shall be determined by a certificate to that effect, signed by the superintendent of the appropriate bureau, to pay to the said party of the second part the whole or such part of the sum last aforesaid as may remain after the expenses of making the said repairs in the manner aforesaid, shall have been paid therefrom.

(32) And the said party of the second part hereby covenants and agrees that he will not sell, or permit to be removed from the line of the work before the trench shall have been refilled, any building sand or earth thrown up, except upon the written permission of said Board, and then only so much as shall remain after reserving a sufficient quantity to refill the trench and complete the paving; but that he will in all cases refill the trench with the same materials thrown out, provided it be good sand, gravel, or earth. But if it be unsuitable, consisting of rock, blasting-stones, or mud, that then the same shall be removed from the ground, and good, clean earth procured, and used for refilling the trench, and sand of proper quality and depth spread on the surface to receive the repavement.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA.

Specifications for laying sewer-pipe connections, and water and gas service pipes.

(1) Sewer-pipe for house connections, and water and gas service pipes shall be laid from the main sewers, and from the water and gas mains, to such points beyond the curb-stones, as the Board of Public Works may from time to time determine.

(2) The trenches will be excavated two (2) feet wider than the pipes, and to such depth, and on such slope as the Board of Public Works may from time to time direct.

(3) Where the average depth of the excavation for any one (1) trench does not exceed six (6) feet, no allowance beyond the price paid for laying the pipes will be paid but, the cost of such excavations shall be included in and paid for in the price paid per foot for laying the pipes.

(4) Where the depth of excavation for any one (1) trench ex-
26 ceeds six (6) feet, the excavation below the average depth of (6) feet will be paid for for the length of pipe laid, and for a width of two and a half ($2\frac{1}{2}$) feet.

(5) The water-pipes will be of lead or composite, and the gas-pipes of iron, and of such strength and quality as may be required by any ordinances of the city of Washington, or any law, or regulation, or direction of the Board of Public Works relating thereto.

(6) All stop-cocks, covers, street-washers, and gas stop-cocks, washers, and fixtures, will be of such form and dimensions as may be determined by the Board of Public Works.

(7) All sewer-pipe connections will be of 6-inch Scotch vitrified stone pipe, or such other pipe as may be approved by the Board of Public Works.

(8) All filling in of the trenches will be made in the manner specified in the specifications of the Board of Public Works for laying sewer-pipes; all trenches will be made to receive all the earth taken from them in addition to the pipes laid, and any deficiency of material will be made with gravel.

(9) All sewer-pipes will be closed with earthen covers, close fitting, not cemented.

(10) The tapping of gas and water mains will be done only by the authorized tappers.

(11) There will be a street-washer at the curb end of each water-pipe, with iron box stop-cock, and covers complete, and a stop-cock and box at the curb end of each gas-pipe.

(12) The price paid for laying water and gas service pipe and stop-cock and sewer-pipe connections, per foot of pipe laid, will include the pipe and stop-cocks, and all excavating and filling the trench (not exceeding the average of six (6) feet in depth), and for all labor and materials for the same. The price paid for each street-washer will include the street-washer and stop-cock, and boxes, all fixtures connected therewith, and all excavation, material, and labor required therefor.

Second. It is further agreed that the said party of the first part shall appoint, from time to time, such persons or person as may be by said party deemed proper, to inspect the material to be furnished, and the work to be done under this contract, and that such persons or person shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

Third. It is further agreed that the work under this contract shall be commenced immediately.

Fourth. It is further agreed that the said party of the first part may, on notice to the said party of the second part, suspend work under this contract; but if not suspended it shall be completed as rapidly as possible from the date fixed for its commencement; and that the said work shall not be sublet without the consent, in writing, of the said party of the first part, and that any subletting or assignment without such consent shall work a forfeiture of this contract.

Fifth. It is further agreed that if, at any time, the party of the first part shall be of opinion that the said work, or any part thereof, is unnecessarily delayed, or that the said contractor is wilfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, all of the work may be discontinued under this contract, or any part thereof; and the said party of the first part shall thereupon have the power to place such and so many persons as may be deemed advisable, by contract or otherwise, to work at and complete the work herein described or any part thereof, and to use such materials as may be found upon the line of said work, or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the said party of the second part, and the expense so charged shall be deducted and paid by the said party of the first part out of such moneys as may be then due, or may at any time thereafter grow due, to the said party of the second part, under and by virtue of this agreement or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed, the said party of the second part shall be entitled to receive the difference; and in case such expense shall exceed the last said sum the amount of such excess shall be paid to the said party of the first part by the said party of the second part.

Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances or injuries to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor; and the said contractor hereby agrees, in the execution of the said work as aforesaid, to keep at all times the said work properly guarded or protected, so as to prevent all injuries to persons, travelers, animals, or property; and in the event of any such injury or injuries occurring in consequence of the insufficient guarding or protection of said work as aforesaid, the said party of the first part shall retain, out of any money or moneys due or to become due said contractor, a sum sufficient to cover all damages arising out of said injury or injuries until the same may be settled at law or otherwise.

27 Seventh. It is further agreed that the said party of the second part shall punctually pay the workmen who shall be employed by him on work under this contract, in cash current, and not in what is denominated store-pay or orders; and that he will, from time to time, and as often as may be required by said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required. And if such evidence is not furnished such sum or sums as may be necessary for such payment or claims shall be retained by said party of the first part until the said claims shall be fully satisfied.

Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the Board of Public Works aforesaid, and that whenever the chief engineer aforesaid shall certify, in writing, that the party of the second part has completely performed this contract on his part, and shall submit with said certificate his estimate of the amount due the party of the second part, then, within thirty (30) days,

as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made as hereinafter mentioned.

And it is further expressly agreed that no money shall become due and payable under this contract, except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract; provided, that partial payments may be made under direction of the said party of the first part, otherwise than upon the estimates of the said engineer, as provided above, if, in the opinion of the said party of the first part, the vigorous prosecution of the work will be promoted thereby.

Ninth. It is further agreed that if at any time during the period of from the completion of the work to be done under this contract, any part or parts thereof shall become defective, from imperfect or improper material or construction, and, in the opinion of the said party of the first part, require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part; and in case of a failure or neglect of the said party of the second part so to do, the same shall be done under the directions and orders of the said party of the first part at the cost and expense of the said party of the second part.

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, viz:

Laying eighteen (18) tile pipe, per lineal foot, one dollar and sixty-two ($1.62) cents.

Laying fifteen (15) tile pipe, per lineal foot, one dollar and thirty-three ($1.33) cents.

Laying twelve (12) tile pipe, per lineal foot, eighty-eight ( ) cents.

Street-washer and box (iron), $6.12.

Stop-cock and box, $4.00.

Excavations and refilling, forty (40) cents per cubic yard, to be measured in excavation only.

Man-holes:

	6	feet	deep	or	under	...	...	.....	$31 68
Over	6	"	"	and	not	more	than	(8) ft....	42 24
"	8	"	"	"	"	"	"	(10) ft.....	52 80
"	10	"	"	"	"	"	"	(12) ft.....	63 36
"	12	"	"	"	"	"	"	(14) ft.....	73 92
"	14	"	"	"	"	"	"	(16) ft.....	84 48
"	16	"	"	"	"	"	"	(18) ft.....	95 04

Man-holes with trap-bottom an additional allowance of $4.64.
Receiving-basins and traps, old corporation pattern, $145.38.
Receiving-basins and traps, Chase's pattern, $114.58.
Which said sums or prices the said party of the first part shall pay to the said party of the second part, as herein provided.

Eleventh. And it is further agreed that should any litigation arise in any way connected with the work embraced, as aforesaid, in this contract, from or by reason of any demand or demands, claim or claims, by any person or persons, to use within the said District of Columbia the improvement,
28 or pavement or pavements, contracted for herein to be laid and put down by the said party *the said party* of the second part, under or by reason of any patent, or assignment of patent, either in the form of royalty or damages, or in any otherwise, the said party of the second part will indemnify and save harmless the said party of the first part from all said demand or demands, claim or claims, whether arising out of suits or otherwise; and the said party of the first part may, at its option, retain from the amount or amounts due, or to become due under this contract, to the said party of the second part, a sum or sums necessary or sufficient to satisfy or liquidate all of said demands or claims, as aforesaid, until they shall be amicably adjusted or finally determined at law.

Twelfth. It is further agreed that the measurements shall be made by the engineer of the said party of the first part, or his assistants.

Thirteenth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia aforesaid, agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay or cause to be paid to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found, from time to time, due him according to the contract.

Fourteenth. It is further agreed that this contract shall be subject to any and all provisions of an act entitled "An act to provide a government for the District of Columbia," approved February 21, 1871, so far as the same shall or may be in any respect applicable to said contract, and also to any law of the District of Columbia pertinent thereto, or to any part thereof, as fully as if the same were particularly set forth herein.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

H. D. COOKE, [L. S.]
ALEX. R. SHEPHARD, [L. S.]
JAMES A. MAGRUDER, [L. S.]
ADOLPH CLUSS, [L. S.]
H. A. WILLARD, [L. S.]
Board of Public Works for the District of Columbia.
OWEN O'HARE, *Contractor.*

Signed and sealed in presence of—
F. H. JOHNSON.
JOHN A. HURLEY.

II.

WASHINGTON, *Oct.* 13*th*, 1873.

Hon. BOARD OF PUBLIC WORKS:

GENTLEMEN: I respectfully request that the prices be increased on my contracts for sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, 446. It is impossible for me to do the work at Board prices, as the alleys are so narrow and not sufficient room to pile the earth. I am obliged to remove it away, and when the trenches are dug to remove it back to fill in. There is also much danger in working so close to the buildings in said alleys, requiring bracing and much extra expense. It requires more than double the time to do this work that it would take on the streets for similar work. I hope you will give this your kind consideration.

Respectfully,

O. O'HARE, *Contractor.*

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, Oct. 14, 1873.

Respectfully referred to the engr. in charge for report.
By order of the Board.

EDWARD JOHNSON,
Asst. Sec't'y.

I recommend that in those narrow alleys where the dirt can hardly be piled the regular price be increased 20 per centum.

ADOLPH CLUSS.

16, 10, '73.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, Oct. 17*th*, 1873.

ADOLF CLUSS, Esq.,
Engineer in Charge:

SIR: The Board rate for sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446 is increased twenty per cent., in accordance with your recommendation of the 16th instant, and you will so amend the contract of Mr. O. O'Hare.

By order of the Board.

CHAS. JOHNSON,
Secretary.

29 The following letter was sent to Mr. O'Hare on the day of its date. Mr. O'Hare testifies that he received it:

OCT. 17TH.

O. O'HARE, Esq., 410 *9th st., N. W.:*

SIR: In your contract for sewering the alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446, the Board rate has been increased twenty per centum.

By order of the Board.

CHAS. S. JOHNSON,
Secretary.

Am. Con. No. 835.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
OFFICE OF CHIEF OF ENGINEERS,
Washington, D. C., Oct. 18, 1873.

WM. E. NOTT, Esq.,
Contract Clerk:

SIR: By order of the Board, the rate for sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446 is increased twenty per cent., and you will so amend the contract of Mr. O. O'Hare.

Very resp'f'y,

ADOLF CLUSS,
Eng'r in Ch'ge.

Between the time when the Board agreed to increase the rate in certain alleys, and gave notice to that effect to the claimant, and the time of signing the modification on the next day, there had been no consultation of the members of the Board among themselves nor with the claimant upon the subject.

This order was given to the contract clerk on the day of its date, from whom on the same day came back the following modification of contract No. 835, which was then signed by the Board, under the impression that it had been drawn up as directed, to include only the work on sewers in the alleys named.

Extension of contract.

C. No. 835.

It is hereby agreed that this contract, with its various terms, conditions, and stipulations (except as respects the time of execution), shall be modified and extended so as to embrace an increase of twenty per centum upon the prices in the foregoing contract.

Witness our hands and seals the eighteenth day of October, A. D. 1873.

ALEX. R. SHEPHERD, [SEAL.]
H. A. WILLARD, [SEAL.]
JAMES A. MAGRUDER, [SEAL.]
ADOLF CLUSS, [SEAL.]
JNO. B. BLAKE, [SEAL.]
Board of Public Works of the District of Columbia.
OWEN O'HARE, *Contractor.*

Signed and sealed in presence of—
F. H. JOHNSON.
JOHN A. HURLEY.

In drawing this modification the clerk used a printed blank. It occupies four lines at the top of a half sheet foolscap paper, and is all in print except the words "an increase of twenty per centum upon the prices in the foregoing contract," and except also the words "modified and," which are interlined. Below these four lines the whole blank page is scored and the signatures made on the back of the half sheet, where blanks were left for that purpose. It appears to have been signed by both parties in mistake of its contents.

For the sewer work done in the alleys above named under contract 835, the 20 per centum was allowed and paid by the Board of Public Works.

For the sewer work done under this contract upon the streets certificates of the measurement and amount due, calculated at the prices in the original contract, were made by the engineers. These certificates were laid before the Board of Audit. They examined the modification of the contract, and without any knowledge of what was behind it, and in mistake of fact, added the 20 per cent., which was paid. The addition amounted to $1,007.82.

III.

On June 2, 1874, the said parties entered into an extension, so called, of said contract 835, which (except the specifications, which are likewise those of said contract 835) is as follows:

Extension of contract No. 835.

It is hereby agreed that this contract, with its various terms, conditions, and stipulations (except as respects the time of execution), shall be extended so as to embrace the excavation for construction and completion of a twelve (12″) inch pipe sewer, with the necessary man-holes and traps, in the alley in square numbered four hundred and twenty-two (No. 422), from the mouth of entrance of said alley to the south side of O street NW.; thence along the south side O street NW. eastwardly to the west side of Seventh street NW., and thence along the west side of said Seventh street NW., in front of square numbered four hundred and twenty-three (423), to a point near N street NW., in the city of Washington, D. C., said work to be executed in every respect in conformity with the accompanying specifications, and at a cost of one thousand two hundred and twenty dollars and seventy-five ($1,220.75) cents.

Witness our hands and seals the second day of June, A. D. 1874.

H. A. WILLARD, [SEAL.]
JAMES A. MAGRUDER, [SEAL.]
JNO. B. BLAKE, [SEAL.]
Board of Public Works of the District of Columbia.
O. O'HARE, *Contractor.*

Signed and sealed in presence of—
F. H. JOHNSON.
WM. E. NOTT.

On June 17, July 12, August 9, August 20, September 20, and December 27, 1875, the claimant entered into the six several agreements, in writing, with the Commissioners of the said District hereinafter set forth, purporting severally to be extensions of, and having like specifications with, the said contract 835, namely:

Extension of contract No. 835.

JUNE 17, 1875.

For and in consideration of the stipulations hereinafter contained, it is agreed, by and between the Commissioners of the District of Columbia and

Owen O'Hare that contract No. 835 in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, viz: Lay and put down a 12-inch pipe sewer in the alley in the square No. 278.

It is further agreed that the said Owen O'Hare shall receive the prices established and paid by the Board of Public Works for work of similar character, provided that payment shall be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

31 *Extension of contract No.* 835.

JULY 12, 1875.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Owen O'Hare that contract No. 835 in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit: Lay and put down the necessary pipe sewers in alley in square No. 900, according to specifications hereunto annexed; also grade and pave the alleys in square No. 245.

It is further agreed that the said Owen O'Hare shall receive the prices established and paid by the Board of Public Works of the District of Columbia for work of similar character, provided that payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

* * * * * * *

In witness whereof this instrument is signed and sealed by the Commissioners of said District, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the party of the second part to these presents has hereunto set his hand and seal this 12th day of July, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
Commissioners of the District of Columbia.
OWEN O'HARE, [SEAL.]
Contractor.

Signed and sealed in the presence of—
WM. A. BROWN.
JOHN A. HURLEY.
WM. TINDALL.

Extension of contract No. 835.

AUG. 9, 1875.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and

Owen O'Hare that contract No. 835 in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, according to specifications thereunto annexed, to wit: Lay and put down the necessary 12-inch pipe sewers in alleys in squares No. 245, 416, and 441. Also the necessary 12-inch pipe sewer on H street south, between 4½ street and 6th street west.

It is further agreed that the said Owen O'Hare shall receive the prices established and paid by the Board of Public Works for work of similar character, provided that payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

In witness whereof this instrument is signed and sealed by the Commissioners of said District, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874; and the party of the second part to these presents has hereunto set his hand and seal this 9th day of August, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
Commissioners of the District of Columbia.
O. O'HARE, [SEAL.]
Contractor.

Signed and sealed in the presence of—
GEO. T. HOWARD.
JOHN A. HURLEY.
WM. TINDALL.

32 *Extension of contract No. 835.*

AUG. 30, 1875.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Owen O'Hare that contract No. 835, in the series contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit: Lay and put down a 12″-inch pipe sewer on F street, between 6th and 7th streets NW., where directed by the engineer of the District of Columbia. Also grade, set curbs, lay brick pavements, pave the carriageway, and construct 12″-inch sewers on Beall street, between High and Washington streets, Georgetown, the surplus earth to be deposited on Monroe street.

Also lay brick foot-pavement on the north side of Stoddart street, between Congress and Washington streets, Georgetown.

It is further agreed that the work herein described shall be completed by the first day of November, 1875, under the penalty of forfeiture of all right and title to perform said work.

It is further agreed that the said Owen O'Hare shall receive the prices established and paid by the Board of Public Works for work of similar

character, provided that payments shall be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the party of the second part to these present' have hereunto set their hands and seals this 20th day of August, 1875.

W. DENNISON, [L. S.]
J. L. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
Commissioners of the District of Columbia.
OWEN O'HARE, [SEAL.]
Contractor.

Signed and sealed in presence of—
WM. A. BROWN.
JOHN A. HURLEY.

(Memoranda in red ink on the margin:)

NOTE.—Jan'y 26, 1876, by order of Commissioners D. C., cancelled so far as relates to paving the carriageway of Beall street, Geo'town.

Cancelled by order of Commissioners D. C., so far as relates to Stoddard street, between Congress and Washington streets, Georgetown.

Extension of contract No. 835.

SEPTEMBER 20, 1875.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Owen O'Hare that contract No. 835, in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

Make such repairs on Fayette street, between 1st and 7th streets, and Second street between Fayette and Warren streets, Georgetown, as may be directed by the engineer of the District of Columbia.

It is further agreed that the work herein specified shall be completed by the first day of November, 1875, under penalty of forfeiture of all right and title to perform the same.

It is further agreed that the said Owen O'Hare shall receive the prices established and paid by the Board of Public Works for work of similar character, provided that payment be made in the bonds issued by the sinking-fund commissioners under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value; and provided further that the total payment for work done on Fayette street, Georgetown, shall not exceed thirty-two hundred and eighty-eight ($3,288.00) dollars in 3.65 bonds.

33 In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the

act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the party of the second part to these present', have hereunto set their hands and seals this 20th day of Sept., 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
Commissioners of the District of Columbia.
OWEN O'HARE, [SEAL.]
Contractor.

Signed and sealed in the presence of—
WM. A. BROWN.
JOHN A. HURLEY.

(Bond with sureties in the penal sum of $1,200.00.)

Extension of contract No. 835.

DEC. 27, 1875.

(Memorandum in red ink on margin:)
NOTE.—Jan'y 26, 1876, by order Commissioners D. C., cancelled so far as relates to paving the carriageway of Beall st., Geo'town.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Owen O'Hare that contract No. 835, in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit: Grade, set curbs, lay brick pavements, construct the necessary sewers, and pave the carriageway of Beall street, between Washington and Greene streets, Georgetown; also, grade, set curb, and lay brick pavements on Beall street, berween Greene and Monroe streets, the carriageway and trees between Greene and Monroe streets not to be disturbed.

It is further agreed that the work herein specified shall be completed by the first day of November, 1875, under the penalty of forfeiture of all right and title to perform the same.

It is further agreed that the said Owen O'Hare shall receive the prices established and paid by the Board of Public Works for work of similar character provided that payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

On August 13, 1873, September 1, 1873, and December 1, 1873, the said parties entered into three other contracts, numbered, respectively, 849, 881, and 990, each for the construction of certain other sewers and appurtenances, with the same prices and other stipulations as in the contract above set forth, and differing therefrom in no material respect except in the location of the work to be done thereunder.

On May 19 and July 9, 1875, the claimant and said Commissioners

entered into the two several agreements, in writing, hereinafter set forth, purporting, severally, to be extensions of, and having like specifications with, the said contract 849, namely.

Extension of contract No. 849.

MAY 19, 1875.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Owen O'Hare that contract No. 849 in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit: Lay a 12-inch pipe sewer on W street, between 14th and 15th streets NW. A 15-inch sewer on New Hampshire avenue from W to V streets NW., and an 18-inch pipe sewer on V streets, between New Hampshire avenue and 17th street NW., with the necessary man-holes and traps, according to specifications hereunto annexed.

34 And it is understood that the work herein described is in lieu of similar work which was to have been done by the said Owen O'Hare on 19th street, N. W. *And it is understood that the work herein described is in lieu of similar work which was to have been done by the said Owen O'Hare on 19th street, N. W.*

It is further agreed that the said Owen O'Hare shall receive the prices established and paid by the Board of Public Works for work of similar character: Provided, That payment shall be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

* * * * * * *

In witness whereof the said District of Columbia has caused this instrument to be signed by the Commissioners of said District, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the common seal of said District to be hereto affixed; and the party of the second part to these present' has hereunto set his hand and seal this 19th day of May, A. D. 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
Commissioners of the District of Columbia.
OWEN O'HARE, [SEAL.]
Contractor.

Signed and sealed in the presence of—
WM. A. BROWN.
JOHN A. HURLEY.

(Bond with sureties in the penal sum of $10,000.00.)

There is attached to this extension the same specifications as to extension of No. 835, dated June 17th, 1875.

COOK & COLE,
Att'ys for Claimant.

Extension of contract No. 849.

AUG. 9, 1875.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Owen O'Hare, that contract No. 849, in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended with its various terms, conditions, and stipulations, to embrace the following work, to wit: Lay and put down a 12-inch pipe sewer on each side of 16th street, between V street and Boundary, with necessary man-holes and traps, according to specifications.

It is further agreed that the said Owen O'Hare shall receive the prices established and paid by the Board of Public Works for work of similar character: Provided, That payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of *of* Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

In witness whereof this instrument is signed and sealed by the Commissioners of said District, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the party of the second part to these presents has hereunto set his hand and seal this 9th day of July, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
Commissioners of the District of Columbia.

OWEN O'HARE, [SEAL.]
Contractor.

Signed and sealed in the presence of—
GEO. T. HOWARD.
JOHN A. HURLEY.

(Bond with sureties in the penal sum of $900.00.)

35 IV.

Measurement of excavation for sewer trenches.

Neither under the administration of the Board of Public Works nor of the Commissioners were the excavations for sewer trenches actually measured. The amount was approximately ascertained by an arbitrary rule, technically called a constant, prescribed by the engineers. Under the Board of Public Works, during the performance of contract 835, such excavations were calculated and paid for, according to a constant then adopted and followed by the engineers and apparently sanctioned by the Board. But some of the excavations made by claimant during the lifetime of the Board were not calculated until after the Commissioners, with Lieutenant Hoxie as engineer, came into power. A new constant was then prescribed by which the amount hitherto allowed was reduced nearly

one-third. Thereupon the following correspondence and action took place relative thereto:

WASHINGTON, D. C., *December* 4, 1874.

Hon. COMMISSIONERS:

GENTLEMEN: Under the late Board of Public Works I was awarded, amongst other things, contracts Nos. 835 and 881, for pipe sewering, with the prices then adopted by the late Board. With this understanding I executed said contracts with the full knowledge and understanding of the prices paid for such work—which prices covered certain width of trenches, according to the different sizes and quality of pipe, namely:

12 inch pipe, 3 feet 10 inches in width—
15 " " 4 " 1 " " "
18 " " 4 " 5 " " "
24 " " 5 " 1 " " " &c., according to the size of pipe, based on the depth given by the engineer.

With this understanding I have complied with the above requirements and finished the above-named contracts, which now appears, by calculations returned by the engineer on vouchers for said work, to have been made by a new scale adopted by himself, which would reduce my accounts nearly one-fifth of the amount actually due me. This I claim as unjust, contrary to the stipulations, and in violation of the late act of Congress authorizing the execution of all unfinished contracts. If I am compelled to take the amount based on the calculation of the engineer, it would not actually pay for the cost of the work.

Hoping, gentlemen, that you will give this your early attention, I remain, very respectfully, your obedient servant,

OWEN O'HARE.

This letter was referred to the engineer for report, to which he made the following reply:

DEC. 2, 1874.

Respectfully returned to the Hon. Commissioners of D. C., whose attention is invited to the enclosed report of the ass't engineer.

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

ENGINEER'S OFFICE,
Washington, D. C., Dec. 7, 1874.

Lieut. R. L. HOXIE, U. S. A.,
Engineer, Dist. of Col'a:

SIR: The statement of Mr. O'Hare, relative to the computation of sewer excavation, is in so far correct that the practice had obtained under the late Board of Public Works to estimate the trenches 20 inches wider at the bottom than the outside of the pipes or brick masonry. Under this practice the trench for a 12-inch pipe was computed 3 feet wide at the bottom, increasing in width at the top according to the depth of the sewer.

The practice was based on paragraph 12 of the specifications for brick masonry and sewers, and on paragraph 2 of specifications for sewer-pipe connections, and there was some reason for it as long as no rate had been established for shoring or for excavation in made ground.

36 In ordinary circumstances the amount of excavation thus computed was largely in excess of the amount actually excavated.

Inasmuch as rates were established for shooting the excavation where the same was required by the nature of the ground, it was thought that no more should be allowed than the amount actually excavated; and all the computations have recently been made in accordance with this view.

B OERTLY,
Asst. Engineer.

December 16, 1874, a copy of this report was sent to claimant, to which he made reply as follows:

WASHINGTON, *Dec.* 19, 1874.

HON. COMMISSIONERS DISTRICT OF COLUMBIA:

GENTLEMEN: In reply to your communication of the 16th inst. in reference to contracts Nos. 835 and 881, I have the honor to state that I have actually made the amount of excavation claimed in my letter. It therefore did not require shoring, and I did not claim in my letter of the 4th inst. anything for such work, as I made the trenches at the old width at the bottom, with a corresponding increase to the top to avoid shoring, with the full understanding I was to be paid for the amount of excavation actually made.

If I am not allowed for the amount of excavation actually made I respectfully ask to be allowed for shoring at the rate of $1.08 per lineal foot.

Some of this work was done over one year ago, and as I have always endeavored to perform my work in a satisfactory manner, I respectfully ask the earliest consideration of this matter.

I am, gentlemen, very respectfully, your obedient servant,
OWEN O'HARE.

This letter was referred to the engineer, from whom was returned the following:

DEC. 19, 1874.

Respectfully returned to Hon. Commissioners of D. C. After a reconsideration of this matter I am of the opinion that the account should stand as it now is.

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

Respectfully referred to the engineer D. C., whose recommendation is approved.

By order.

WM. TINDALL,
Sec'y.

JANY. 23, 1875.

The following notice was given to the claimant:

JAN. 27, 1875.

MR. OWEN O'HARE,
Washington, D. C.:

SIR: In reply to your communication of Dec. 19, submitting statements relative to your contracts No. 835 and 881 for pipe sewering, you are re-

spectfully informed that after a careful reconsideration of the subject the opinion is held that the account should stand as it now is.

By order of the engineer.

FRANK'N T. HOWE,
Chief Clerk.

February 26, 1875, the claimant was paid for this excavation through the Board of Audit, the amount being calculated according to the Hoxie constant, and gave a receipt "in full settlement of the above-stated claim." By this new rule of measurement the claimant lost on work done before its adoption $309.55. Some eight months after this change of rule claimant entered into the contracts called extensions of No. 835, set out in Finding III, under which he performed a large amount of sewer excavation. He was paid on a measurement under the new rule without objection.

37 The rule of measurement first adopted was based on the supposition, regardless of the real fact, that trenches would be twenty inches wider at the bottom than the pipe, and sloping upward and outward, one foot in ten. What the new rule was does not appear, nor does it appear whether the old rule was adopted before or after the making of contract No. 835.

Prior to the adoption of the Hoxie constant the claimant was paid for sewer excavation by the Board of Public Works $2,639.13 more than he would have been entitled to if measured according to the Hoxie rule. The actual measurement was never made, but if made, would not have exceeded the amount calculated by the Hoxie rule.

V.

There is due the claimant for retains or admitted and unsettled account not elsewhere stated, $3,472.03. Also for retain of $287.79 on account of imperfect work on Beall street, which was afterwards made good. Also $242.20, for work on Stoddart, Beall, and Green streets. Making in all in this finding $4,002.02.

VI.

Claimant was authorized by defendant in September, 1875, to furnish materials and lower the water-main on Beall street. The engineers gave him the grade. After the job was partly completed the grade was lowered. The main was taken up and after the trench was deepened, relaid. He was paid for the first lowering, but not the second. For this second lowering he charged $158. The bill for that amount was approved by the water registrar and was reasonably worth the amount charged. Some other small charges connected with this work, amounting in all to $98.20, was properly disallowed by the water registrar. The account, except the said $148, was settled and paid to the claimant.

Claimant also furnished a trap and basin (Chase pattern) which in mistake was credited to him December 23, 1875, at $71.75 instead of $114.58, the contract price. Also another trap and basin (old corporation pattern) credited in mistake at $95.04 instead of $145.38, the contract price; the two make an error of $93.67.

VII.

In the summer of 1873 the claimant laid down water-mains on Eighth, Ninth, Tenth, and H streets, northeast, furnished materials in part therefor, and did much other work connected therewith. Claimant did this work by the direction of Governor Shepherd and claimed to have an oral agreement with him for special rates. The Board settled with and paid him at the rates established and paid by them for similar work. The prices paid were fair and reasonable. At the prices alleged to have been agreed upon the work and material would have made $1,089.35 more than the Board allowed and paid.

VIII.

Claimant presents a bill of $210.70 for hauling curb-stone from 6th street wharf to Georgetown. The hauling was done, but under the extension contract dated August 20, 1875, by which the claimant undertook to set the curb at a fixed price per linear foot, but in fact furnished it as well, and was allowed the full price established for furnishing and
38 setting curbs, which included the expense of getting the curb to the place of setting.

It does not appear that 177 square yards of cobblestone were furnished to the District by claimant.

It does not appear that the claimant did any work or furnished any material for the District under the contracts set forth in his petition or otherwise claimed therein which is not specified in these findings, except such as he has been paid for in full.

COUNTER-CLAIMS.

IX.

For all sewer work done by the claimant under said contract 835, in alleys in the squares designated in said contract and in his request aforesaid for increased compensation, he has been paid the prices specified in the contract, with 20 per centum in addition as agreed as aforesaid, and no claim therefor is now made. By mistake he was paid also at the same rate for the other sewer work described in said contract as set forth in Finding II, amounting to $1,007.82, which sum defendant claims to recover back.

For all sewer work done under the several so-called extensions aforesaid of said contract 835, by the Board of Public Works and Commissioners of the District, he has been paid the prices specified in the extension, less such retains therefrom and balances as shall hereinafter appear.

That is to say, at the rates prescribed in the original contract No. 835 without the 20 per cent. increase. At that time he demanded no more. The prices prescribed in said original contract 835 corresponded with the prices established and paid by the Board of Public Works for work of a similar character.

X.

The defendant claims to recover back $2,639 paid by the Board of Public Works for excavation in sewer trenches, measured by the engineers according to an arbitrary rule in excess of the actual excavation.

The facts are more fully stated in Finding IV in connection with claimant's case.

XI.

Claimant was allowed by the Board of Public Works upon the report and certificate of the engineers $681.75 for damage and excavation of cavings in the progress of his work, which the defendant claims to recover back. It does not appear whether the caving was caused by "the action of the elements," or by some fault or neglect of the defendant.

The claimant was also paid for excavations in certain made ground at the rate of 50 cents per cubic yard instead of 40 cents. These items and prices were certified to by the proper engineers and payment authorized by the Board of Public Works. For what reason these sums were allowed by the Board does not appear. The whole allowance amounted to $838 in excess, which the defendant seeks to recover back.

XII.

In 1875, upon the report and certificate of defendant's engineers, the claimant was allowed and paid for shoring in various places the
39 aggregate sum of $5,929.89. Whether the shoring was left in the trenches or not does not clearly appear.

XIII.

In the summer of 1873 the claimant, by oral direction of Governor Shepherd, laid water-mains on Eighth, Ninth, Tenth, and H streets, northeast, and furnished some material. He made out and presented an itemized bill therefor at prices alleged to have been agreed upon by Governor Shepherd himself. The bill was considered too high, and by the advice of the inspector of water-mains, under whose supervision the work was done, it was reduced by the Board of Public Works to conform to the prices established and paid by them for similar work. The bill, thus reduced, was paid to and accepted by the claimant without objection. The amount thus paid was a fair and reasonable compensation for the work and material. In June, 1874, the claimant again presented the portions of this bill which had been disallowed. It was approved in part by the registrar of water-mains to the amount of $703.35 and sent to the Board of Public Works. By the Board it was referred to their auditor, but never acted upon either by the Board or auditor. February 13, 1875, it was paid in mistake of fact by the Board or Audit.

December 27, 1873, claimant presented another bill for alleged extra work on the same job, for taking up pavement through which the trenches were dug, amounting to $361.20. The bill was never allowed by the Board nor approved by the auditor or engineers, and appears to have been included in the work already settled for. It was paid by the Board of Audit in mistake of fact.

XIV.

Under contract 835 the claimant was required to clean up the alley in square 398, but wholly neglected to do so, and the defendant was compelled to have the work done by other parties, which was done at a cost of $49.06.

XV.

The counter-claim of $80 for error on voucher 19507 is admitted.

CONCLUSION OF LAW.

Upon the foregoing findings of facts, the court decides as conclusions of law:

That the modification of contract No. 835, dated October 18, 1873, should be reformed by inserting therein, after the word "prices," the words and figures following, to wit, "for sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446."

That the claimant is entitled to recover upon the claims presented by him the sum of $4,553.24, and the defendant is entitled to recover upon the counter-claims the sum of $2,141.43; leaving a balance in favor of the claimant of $2,411.81.

X.—*Opinion of the Court.*

SCOFIELD, J., delivered the opinion of the court:

In this case the parties are wide apart. The demands of the claimant, according to his amended brief, amount to $15,017.78. The defendant, while contesting them all except $4,002.02, sets up counter-claims amounting to $13,049.30. In disposing of the disputed items we are required to revise and rejudge the decisions, settlements, and allowances made by the Board of Public Works, or by the Commissioners, engineers, and auditor of the District, or by the Board of Audit. The accounts are numerous and stale, and the evidence scanty, confused, and contradictory.

In matters of counter-claim the burden of proof is upon the defendant. Evidence that would not justify a finding for the claimant, were he in the affirmative of the issue, may still be too weak to justify a finding against him where the defendant is in the affirmative. Under this rule we have been constrained to leave undisturbed payments of a questionable character which have been authorized by some of those officers.

The three items of claim set out in Finding V are not in controversy. They amount to $4,002.02.

The first item in dispute is dependent upon the construction to be given to claimant's agreement to "receive the prices established and paid by the Board of Public Works" in the several extensions of contract No. 835, taken in connection with the modification presented in Finding II. Contract No. 835 is in Finding I, and its many extensions in Finding III. The claimant contends that all these extensions are brought under the 20 per cent. modification, and for all sewer work done under them, he is entitled to 20 per cent. upon the prices allowed in the original contract, No. 83 5

The defendant has already paid all but the 20 per cent. The 20 per cent. additional on the work done amounts to $5,530.69. The following is the modification:

Extension of contract No. 835.

It is hereby agreed that this contract, with its various terms, conditions, and stipulations (except as respects the time of execution), shall be modified and extended so as to embrace an increase of twenty per centum upon the prices in the foregoing contract.

Witness our hands and seals the eighteenth day of October, A. D. 1873.

Here is one of the extensions. So far as this question is concerned, they are all alike:

Extension of contract No. 835.

JUNE 17, 1875.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commisssoners of the District of Columbia and Owen O'Hare, that contract No. 835 in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, viz: Lay and put down a 12-inch pipe sewer in the alley in the square No. 278.

It is further agreed that the said Owen O'Hare shall receive the prices established and paid by the Board of Public Works for work of similar character; provided that payment shall be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

We do not understand that the "prices established and paid by the Board of Public Works" refer simply to the prices agreed upon in contract No. 835, either by itself or with its modification. Independent of that particular contract the Board had established a scale of prices, as
41 shown in Finding IX, to which that contract itself conformed. If it had been the intention to pay the prices of 835, with the 20 per cent. modification, it was not only unnecessary, but confusing to insert the words "prices established and paid." They seem to have been inserted to avoid such a conclusion. If the parties had so agreed they would most certainly have added "with 20 per cent. additional."

At that time claimant had two other contracts, as appears in Finding IV, dated August 13, 1873, and September 1, 1873. They were for sewer work at the prices named in the original of No. 835. He did not even request to have the prices increased. He made another contract for similar work December 1, 1873, at the same prices. These contracts also had extensions in which it was stipulated that claimant should "receive the prices established and paid by the Board of Public Works," not the prices agreed to in No. 835. That contract conformed to the standard prices but it did not establish them. At that time the claimant himself must have understood the extensions as the defendant now understands them, for he settled all this work at the established prices, not only without complaint but without any suggestion that he was entitled to 20 per cent. more. This item of the

claim must therefore be rejected. In arriving at this conclusion, we consider the modification as it stands in the findings. The question as to its reformation is discussed in another place.

The second item of claim consists of an alleged undermeasurement of the excavation in sewer trenches. The facts appear in Finding IV. For pipe sewers, the width of the trenches was not definitely fixed by contract, nor by the subsequent direction of the engineers; nor was it the practice of the engineers to measure the amount of excavation by the size of the trench. They measured or calculated according to an arbitrary rule, called in engineering parlance a constant. The constant adopted and followed by the engineers under the Board of Public Works assumed the trench to be 20 inches wider at the bottom than the pipe, with a slope upward and outward of one foot in ten. To the contractor, a narrow trench had some advantages and some disadvantages. He had to move less earth, but the danger of caving was increased and the safety and comfort of the workmen diminished. He might have his choice, but, whether wide or narrow, by this constant the trench yielded the same amount of measured excavation. Under contract No. 835 the claimant made narrow trenches, but, during the administration of the Board of Public Works, the excavations were measured by this constant and he was paid accordingly. At the time the board was abolished there was some of this excavation not yet measured. The Commissioners, under the advice of Lieutenant Hoxie, adopted a different constant, arbitrary like the other, but approximating more nearly the actual excavation. By this constant claimant's allowance for excavation was greatly diminished. He remonstrated earnestly, but finally accepted the amount offered.

By the terms of the contract the parties were to abide the measurement of the engineers, but this, as we held in the Neitzey case (17 C. Cls. R., 111), is not conclusive. The claimant having incurred the danger and inconvenience of narrow trenches while the former constant was in practice, was entitled to be paid by it for all work done prior to the change. The amount to be allowed is $309.55.

The sewer excavations subsequent to the change of constant were under extensions made long after. In these he contracted with a full knowledge that excavations were to be measured by the Hoxie constant, and has no right to complain.

42 The claim of $148 for lowering the water-main on Beall street a second time, and the claim of $93.67 for the difference between the amount paid and the contract price for two traps and basins, as shown in Finding VI, are proper charges.

The claim for hauling curb-stone from Sixth street wharf to Georgetown, and the claim for 177 yards of cobble-stone, on the facts presented in Finding VIII, and other claims, amounting in all to $1,089.35, on the facts presented in Finding VII, should not be allowed.

COUNTER-CLAIMS.

In the first item of the counter-claims the defendant seeks to recover back $2,639 paid to the claimant for alleged excess in measurement of sewer excavation. Until the Commissioners came into power the claimant was allowed for narrow trenches, by a constant adopted by the engi-

neers for the measurement of his work, more than the actual amount of excavation as shown in Finding IV. In this there was no fraud on the part of the claimant, and no mistake of fact on the part of the engineers. After the Commissioners came in the constant was changed, but this work was done, the amount understandingly calculated by the engineers, and allowed by the Board of Public Works before the change. The question is more fully discussed in another place. As there stated we think the claimant is entitled to this measurement for all work done before the change. The counter-claim is not allowed.

By the second item of the counter-claim the defendant seeks to recover back $5,929.89 paid the claimant for shoring, claimed to have been left in the trenches. This sum was paid at different times on the report and certificate of the engineers, approved by the Commissioners. The defendant alleges that the certificates were false and the payments were made in mistake of fact. As the amounts have been paid, and, if the certificates are true, properly paid, it devolves upon the defendant to prove them false. If the shoring was left in the trenches the payments were properly made; if not they should be refunded. In the conflict of evidence the court has not been able to find as a fact, as appears in Finding XII, that the engineers made false certificates, nor that the shoring was not left in the trenches. This item of counter-claim is therefore not allowed.

Third. The claimant was paid by the Board of Public Works $681.75 for excavation caused by caving of the trenches; also, $838 in excess of 40 cents a cubic yard for excavation in made ground, and calculated at 50 cents a cubic yard. The defendant contends that these two sums were paid in violation of article 6 of the specifications and the agreement for 40 cents a cubic yard for excavations, and should be refunded. The facts are stated in Finding XI. It does not appear whether the caving was caused by "the action of the elements" or by some fault of the defendant. By the terms of the contract claimant was to be paid only 40 cents a cubic yard for excavation, but the Board rates for made ground was 50 cents a cubic yard. The engineers certified to both bills, and the Board of Public Works approved them, for what reasons does not appear. It might have been for some action, fault, or neglect of the defendant. It does not appear to have been paid in any mistake of fact, and cannot be recovered back.

The fourth item of counter-claim is based upon the facts set out in Finding XIII.

In the summer of 1873 the claimant, by the oral direction of
43 Governor Shepherd, furnished materials and laid water-mains on Eighth, Ninth, Tenth, and H streets. He made out and presented an itemized bill at prices alleged to have been agreed upon between Governor Shepherd and himself. The bill was considered to high by the Board of Public Works, and was reduced to conform to prices established and paid by them for work and materials of a similar character. The bill thus reduced was paid to and accepted by the claimant without objection. The amount thus paid was a fair and reasonable compensation for the work and materials. The agreement of Governor Shepherd for higher rates, if any such were made, was entirely void. (Neuchatel Paving Company v. the District of Columbia, 17 C. Cls. R., 386.) Subsequently the claimant presented two bills, one of $301.20 and the other of $703.35, growing

out of the same transaction, the most of which had been disallowed and rejected from his original bill, and all of which had been included in the settlement and paid for at fair and reasonable rates established by the Board. These two bills, amounting together to $1,004.55, not having been again acted upon by the Board, were presented by the claimant to the Board of Audit and paid in mistake of fact. In the opinion of the court the defendant is entitled to recover back this amount.

The fifth item of counter-claim grows out of an alleged mistake in the modification of contract No. 835. No work was embraced in that contract except the laying of sewers. Part of the sewers were to be laid in streets and part in alleys. The contract is dated August 12, 1873. The modification, which is dated October 18, 1873, originated, as appears in Finding II, in the following manner: October 13, 1873, the claimant addressed to the Board a letter in the nature of a petition, requesting that he be allowed an additional "price for sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446." He gave as the reason of this request, that the alleys were so narrow that there was no room to pile the earth; that it had to be carried off and afterwards brought back to fill the trenches. On the next day the Board referred it to the engineer, who reported on the 16th and recommended "that in those narrow alleys where dirt can hardly be piled, the regular price be increased 20 per centum." On the 17th the Board resolved to increase the price 20 per centum in these alleys. They notified the claimant on the same day, in which notice they repeated the numbers of the squares in which the alleys were. They also directed the engineer to have the modification prepared. On the 18th the engineer informed the contract clerk in writing that the "Board had increased the rate for sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446, 20 per cent.," and directed him to have the amendment prepared. On the same day the modification was sent in to the Board from the contract clerk. It was on a printed blank on the top of a half sheet of foolscap paper, and the blanks for the signatures were upon the back. Without careful examination, the parties signed it in mistake, supposing that it was written according to order. After the order to amend the contract was given, there had been no consulation among themselves and no communication with the claimant before signing. The claimant's signature was scarcely necessary. Stripped of unnecessary verbiage, it is a simple concession to the claimant. It gave him 20 per cent. additional for work he was already bound to do without it. It was without consideration appearing on the paper, and his signature was only necessary to bind him not to refuse the 20 per cent. But no objection is now made to it on that account.

We are, therefore, of the opinion that the contract should be re-
44 formed by inserting after the word "prices" the words and figures following: "For sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446." The Board of Public Works paid for all sewer work done in these alleys, with the 20 per cent. addition. Certificates of measurement and amounts due, according to the prices in the original contract for sewer work done on the streets, were also made out by the engineers. These certificates were laid before the Board of Audit. This Board, after examining the modifications, and, unaware of what was behind it, added the 20 per cent., and it was thus paid. This was done in mis-

take of fact, and by the terms of the reformed contract the defendant is entitled to recover it back. The amount is $1,007.82.

The court, upon due consideration of the premises, order, adjudge, and decree that the contract between the parties, known as the extension of contract No. 835, and dated October 18, 1873, be reformed by inserting after the word "prices" the words and figures following, to wit, "For sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446."

And it is further ordered, adjudged, and decreed that the claimant be allowed upon his several claims the sum of $4,553.24, and that the defendant be allowed upon the several counter-claims the sum of $2,141.43; and that upon the whole case the claimant have and recover from the defendant the balance of his claims over and above the counter-claims in the sum of $2,411.81.

45 XI.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 28th day of May, A. D. 1883, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, order, adjudge, and decree that the contract between the parties known as extension of contract No. 835, and dated October 18, 1873, be reformed by inserting after the word "prices" the words and figures following, to wit: "For sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, & 446." And it is further ordered, adjudged, and decreed that the claimant be allowed upon his several claims the sum of four thousand five hundred and fifty-three $\frac{24}{100}$ dollars, and that the defendant be allowed upon the several
46 counter-claims the sum of two thousand one hundred and forty-one $\frac{43}{100}$ dollars, and that, upon the whole case, the said Owen O'Hare do have and recover in the manner provided by the act of June 16, 1880, chapter two hundred and forty-three, the sum of two thousand four hundred and eleven $\frac{81}{100}$ dollars ($2,411.81) upon debts of the District of Columbia due and payable January 1, 1876, within the meaning of the sixth section of the said act.

47 XII.—*Application of defendant for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on May 28th, 1883, in favor of claimant, the defendant, by their Attorney-General, on the 25th day of August, 1883, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed August 25, 1883.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief Justice.

48 XIII.—*In the Court of Claims.*

OWEN O'HARE
versus
THE DISTRICT OF COLUMBIA. } No. 24.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and conclusions of law thereon, of the opinion of the court, of the final judgment of the court, of the application of defendant for allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City, this tenth day of October, A. D. 1883.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

(Indorsement on cover:) No. 415. The District of Columbia, appellant, vs. Owen O'Hare. Court of Claims. Filed 12th October, 1883.

122-640

In the Supreme Court of the United States

OCTOBER TERM, 1886.

THE DISTRICT OF COLUMBIA, APPELLANT,
vs.
OWEN O'HARE.
} No. 158.

APPEAL FROM THE COURT OF CLAIMS.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE DISTRICT OF COLUMBIA, APPELLANT,
vs.
OWEN O'HARE.
} No. 158.

APPEAL FROM THE COURT OF CLAIMS

STATEMENT OF APPELLANT.

Owen O'Hare, the claimant in the court below, on the 12th day of August, 1873, entered into a contract in writing (No. 830) with the Board of Public Works of the District of Columbia "to excavate for, construct, and complete pipe sewers with the necessary manholes and traps" in alleys and streets in the city of Washington, D. C., in said contract specified (Rec. pp. 10 to 21).

The Board of Public Works, as to certain of the alleys, agreed to increase the contract price for sewering 20 per centum (Rec., pp. 22, 23). In the extension of the said contract No. 835, in accordance with such agreement, by mistake an extension was made and signed, whereby an

an increase of 20 per centum was made on all contract prices instead of limiting such increase to the sewering in alleys in squares 397, 398, 420, 421, 422, 444, 445, and 446, as agreed to (Rec., p. 23).

Other extensions of contract No. 835 were made at different times, the details of which appear in the record in pages 24, 25, 26, 27, 28, 29, and 30.

By a clause in the original contract claimant was to be paid for excavations and refilling, 40 cents per cubic yard, to be measured in excavations only (Rec., p. 20). This clause as to measurements was in no degree modified or changed by the subsequent extensions.

Finding IV (Rec., p. 30. *et seq.*) is substantially as follows:

Part of the excavations for sewer trenches were made under the administration of the Board of Public Works and part after the District Commissioners, with Lieutenant Hoxie as engineer, came into power.

Some of the excavations made by the contractor during the administration of the Board of Public Works were paid for upon measurements calculated by Lieutenant Hoxie under direction of the District Commissioners. No actual measurements of sewer excavations were made either under the Board of Public Works or the District Commissioners.

Under the Board of Public Works the amount of excavation was approximately ascertained by an arbitrary rule technically called a constant, prescribed by the engineers.

This rule of measurement was adopted, based on the supposition, regardless of the real fact, that trenches would

be twenty inches wider at the bottom than the pipe, and sloping upward and outward one foot in ten.

A new rule of measurement was adopted under the administration of the Commisssoners, known as the Hoxie constant. What the new rule exactly was does not appear. The measurements made by it, however, reduced the amount before allowed nearly one-third.

The new constant was applied to the measurement of the work done, but not accepted, at the time the Commissioners assumed control. Claimant remonstrated at this change, but such mode of measurement was insisted upon, and he finally accepted payment under the rule adopted, and gave a receipt in full settlement of the above-stated claim. Subsequent payments were made in accordance with the Hoxie constant.

Prior to the adoption of the Hoxie constant the claimant was paid for sewer excavation by the Board of Public Works $2,639.13 more than he would have been entitled to if measured in accordance therewith.

Actual measurement, if made, would not, at any time, have exceeded the amount calculated by the Hoxie rule.

Claimant in his original petition claimed $20,928.09. By amendments to the petition this amount was reduced to $15,017.78. The defendant, whilst contesting the whole claim except $4,002.02, set up counter-claims amounting to $13,049.30.

Among the counter-claims was one for "overpayments on account of excavation of sewer trenches in excess of the amount actually excavated" (Rec., p. 6), $2,639.

This set-off was for the payment made claimant under the administration of the Board of Public Works, being

the amount in excess of what he would have been entitled to if paid under the Hoxie constant.

The court decided that the claimant should be allowed on his several claims the sum of $4,533.24, and that the defendant should be allowed upon the several counter-claims the sum of $2,141.43, and that upon the whole case the claimant should have and recover from the defendant the balance of his claims over and above the counter-claims the sum of $2,411.81. The counter-claim for $2,639 was not allowed.

No appeal from this decision has been taken to this court by claimant.

Under the facts as found by the court below, the main questions presented by defendant's appeal are as to the correctness of the decision of the court below in allowing the sum of $309.55 (Rec., pp. 33 and 38) for the excavating sewer trenches prior to adoption of the Hoxie constant and in refusing to allow the counter-claim for $2,639.13 above referred to.

Appellant claims that under the terms of the contract made with the Board of Public Works (Rec., p. 20) claimant was only entitled to be paid for excavations actually made.

That he was paid on the certificate of the District engineer that he had measured and inspected the work, when both engineer and claimant knew such certificate to be false, and when no measurement had ever been made.

That the engineer in charge had no right to certify to an arbitrary measurement not authorized by the contract, and that any excess of payment made by reason of such false certificate, having been wrongfully paid and wrongfully received, should be recovered back.

ASSIGNMENTS OF ERROR.

I.

The court erred in deciding "that the claimant be allowed upon his several claims the sum of $4,553.24, and that the defendant be allowed upon the several counter-claims the sum of $2,141.43, and that upon the whole case the claimant have and recover from the defendant the balance of his claims over and above the counter-claims in the sum of $2,411.81."

II.

In deciding "the claimant, having incurred the danger and inconvenience of narrow trenches while the former constant was in practice, was entitled to be paid by it for all work done prior to the change. The amount to be allowed is $309.55."

III.

In not allowing the counter-claim against claimant for $2,639, being for overpayments on account of excavation of sewer trenches in excess of the amount actually excavated.

IV.

The court erred in rendering judgment in favor of claimant.

V.

In not rendering judgment in favor of defendant.

ARGUMENT.

No actual measurements were ever made of the amount of sewer excavations. Payments were made the contractor under two constants or rules of measurement, one adopted by the engineer of the Board of Public Works of the District of Columbia, the other known as the Hoxie constant, in force under the District Commissioners.

Under the rule adopted by the engineer of the Board of Public Works, the contractor was paid according to an arbitrary rule, which assumed the trenches to be 20 inches wider at the bottom than the pipes, with a slope upward and outward of 1 foot in 10 (Rec., p. 38). What the rule, known as the Hoxie constant was, does not appear in evidence (Rec., p. 33), but by the application of such rule, the amount before allowed for sewer excavation was reduced nearly one-third (Rec., p. 31). "Prior to the Hoxie constant claimant was paid $2,639.13 more than he would have been entitled to if measured according to the Hoxie rule." "By this new rule of measurement the claimant lost on work done before its adoption $309.55." "The actual measurement was never made, but if made would not have exceeded the amount calculated by the Hoxie rule" (Rec., p. 33). Nevertheless, the court below decided that claimant should have judgment for $309.55 for excavations that were never made, and refused to allow the counter-claim of defendant for $2,639.13, although as appears by Finding IV the contractor was paid for theoretical, not actual, excavations.

The sum of $309.55 was decided by the court to be due

claimant, although not allowed by the certificate of measurement made by the engineer, for reasons:

1st. That the measurement of the engineers is not conclusive. *Neitzey's Case* (17 C. Cls. R., 111).

2d. The claimant having incurred the danger and inconvenience of narrow trenches while the former constant was in practice was entitled to be paid by it, for all work done prior to the change.

It is submitted that the court below was in error in deciding that the claimant was to be paid according to the terms of the first constant. It is not in evidence whether such constant was adopted before or after the making contract No. 835. Even if it had been made prior to the making of such contract, the contract and not the constant must govern.

The contract provides that excavations and refilling should be measured in excavations only (Rec., p. 20), and that no money shall become due and payable under the contract except upon the certificate of the engineer (Rec., p. 20). It appears by Finding IV (Rec., p. 33) that the calculation was made according to the Hoxie rule; that the actual amount of excavation made was covered by such calculation; that it was so certified by the District engineer; that payment was made upon such certificate, and a receipt given by the claimant in full settlement. There is no evidence that such receipt was given under *duress*. Claimant's subsequent work was measured under the new rule. It is true, as stated in the opinion of the court, that it was held in the *Neitzey Case* (17 C. Cls. R., 111), that the measurement of the engineers is not conclusive. It is also held in that case that under the provis-

ions of the District Claims Act measurements and amounts may be established by evidence, as if no such provision as to manner of measurements existed in the contracts.

If, as is found by the court, claimant has been paid for the full amount of excavation made by him, then it would appear that the award in his favor of $309 is wrong, as being based on an arbitrary rule of measurement not warranted by the contract. The reason for the allowance of such measurement given by the court that claimant "had incurred the danger and inconvenience of narrow trenches, while the former constant was in practice, and was entitled to be paid for it for all work done prior to the change," is a conclusion not warranted by law or the facts in evidence. It does not appear that such constant was adoped at the time contract No. 835 was entered into (Rec., p. 33).

If the court was correct in deciding that, notwithstanding claimant was paid according to the certificate of measurement of the engineer in charge, and that without *duress*, and with a full understanding of his action, he gave a receipt in full settlement, he is entitled to the sum of $309.55, for work done before the adoption of the new constant, then the court below was clearly right in disallowing defendant's set-off of $2,639.13.

If, on the contrary, this court should regard, as herein claimed, the allowance of said sum of $309.55 as wrongfully made, the question yet remains as to the disallowance of the counter-claim of $2,639.13.

Payment had been made claimant of such sum. It had been made on an arbitrary rule, it is true, but it was a rule adopted by the engineer in charge and approved by the Board of Public Works. It had been made in pur-

suance of the certificate of the engineer, and such certificate purported to be made in accordance with the terms of the contract. In *Neitzey's Case, supra,* it was held, as stated by the court, that the measurement of the engineers is not conclusive, and it is also held, that in an action to recover back money paid in mistake, if the mistake relates to the measurement of a certain area, it may be established by showing that the area does not contain the number of square yards for which payment was made.

In the present case it is found by the court that claimant received payment under the first constant for nearly one-third more excavation than he had actually made. Such payment may have been made and received in good faith, with full knowledge on the part of payor and payee, yet, if not warranted by the contract, the payment was made by mistake. The contractor had no right to demand, the engineers to verify, or the accounting officers to pay, except in pursuance of the express terms of the contract. The claimant agreed to make excavations for sewers at a price fixed in the contract. Measurements of such excavations was required to be made by the engineer in charge. Such measurements were never made; on the contrary, the engineer, governed by an arbitrary rule, certified that nearly one-third more work had been done than had actually been done.

This was known to claimant; he received payment on a theoretical calculation. He knew that such calculation allowed him credit for one-third more excavation than he had actually made. When the engineer in charge refused to continue to authorize such rate of payment he remonstrated (Rec., p. 31). Such remonstrance being ineffectual

he was paid for the work actually done, and gave his receipt in full. Neither constant was a part of the contract, but the Hoxie constant conformed more nearly to the fact. If the constant did not form a part of the contract, and it cannot be assumed to have been because it is not in evidence that it was in force when contract No. 835 was entered into, then it is submitted that the court below was clearly in error in disallowing defendant's counter-claim for $2,639.13. If the first constant was not in the first instance a part of the contract, under the principles decided in *Neuchatel Company Case* (17 C. Cls. R., 386), it could not have been made so except by the formal action of the Board of Public Works and expressed in writing.

Overpayments made by mistake in accounts of this character are recoverable. This is recognized by the court below in the case at bar. It was expressly so decided in the Neitzey case, *supra*. It has been so held in all the cases before the Court of Claims arising under the District Claims Act, 16th June, 1880, in which the question was presented.

It is respectfully submitted that the judgment of the court below, in so far as claimant is allowed the sum of $309.55 for work done prior to the change of constant, and the counter-claim of defendant for $2,639.13 is disallowed, be reversed.

A. H. GARLAND,
Attorney-General.
F. P. DEWEES,
Assistant Attorney.

122-640
122-640

Supreme Court of the United States.

No. ———

THE DISTRICT OF COLUMBIA, Appellant,

vs

OWEN O'HARE, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

Brief in Behalf of Appellee.

W. A. COOK,
C. C. COLE.
Att'ys for Appellee.

Supreme Court of the United States.

No. ——

THE DISTRICT OF COLUMBIA, Appellant,

vs

OWEN O'HARE, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

Brief in Behalf of Appellee.

This was a suit brought by the appellee against the appellant in the Court of Claims, under the provisions of the Act of Congress, approved June 18, 1880, to provide for the settlement of out-standing claims against the District of Columbia.

The amount of the claim asserted on behalf of the claimant in the final brief in his behalf in the court below was $15,017.78. The appellant admitted $4,002.02, and contested the residue of appellee's claim, and set up as a counter-claim $13,049 30, and asked a judgment against the appellee for the difference. (See opinion of the court below, p. 36 of the record.)

The court below allowed appellee $4,553.24 of the claim asserted by him, and the appellant $2,141.13 of the counter-claim presented by it, and gave judgment in favor

of appellee against appellant for the difference, amounting to $2,411 81 with interest. (See final judgment, p. 41 of the record.)

Of the $4,553.24 allowed by the court below to claimant, $4,002.02 thereof was admitted by the defendant to be correct. (See opinion of the court, p 36, and finding of facts numbered 5, p. 33 of the record.) This leaves only $551.22 of the claimant's demand allowed by the court below, which is contested by appellant. This sum is made up of three small items, as follows, to wit:

For excavation of sewer trenches, - -	$309.55
For lowering water main. - - - - -	148.00
Difference between contract price and amount paid claimant for two traps and basins. -	93.67
Total, - - - - -	$551.22

The following items of the counter-claim presented by defendant were disallowed by the court below, to wit:

Alleged excess in allowance of excavation for sewer trenches, . . .	$2,639.13
Alleged erroneous payment to claimant for shoring left in sewer trenches, .	5,929.89
Alleged erroneous payment to claimant for excavation caused by caving of trenches,	681.75
Alleged excessive payment for excavation in made ground, ...	838.00
Total difference on appeal, .	$10,639.86

(See opinion of court, pp. 38 and 39 of record.)

Seven items are in controversy--three presented by claimant and allowed by the court below, and four presented by defendant as counter-claim, and disallowed by the court below. We will present these in their order:

FIRST.

For the excavation of sewer trenches, . $309.55

This item is claimed by the appellee for excavation in sewer trenches, and the amount claimed in the court below was several thousand dollars. That court allowed this small part of the claim and rejected the residue. The facts in relation to it, as found by the Court of Claims is set out in finding IV, pp. 30 to 33 of the record. They are substantially that at the time of the making of the contract, under which the excavation was done, the government of the District of Columbia, so far as related to the improvement and repairs of streets and alleys, construction of sewers, &c., was being administered by the late Board of Public Works, and that that board, at the time of making the contract in question had a rule or regulation in force, that in making calculations of the quantity of excavation for sewer trenches no actual measurement of the earth removed would be made, but that the calculation would be made in accordance with a constant adopted for that purpose, based upon the size of the pipe, so that a party entering into a contract to lay a sewer pipe of a given size, would know from this rule, at the time of making the contract, what he would be entitled to receive for excavation. That under contracts made between claimant and the Board of Public Works he did excavation in laying sewers, for which he had not been paid at the time that board was legislated out of existence by Congress, and the present form of government by Commissioners created. That after the change in the form of government and before claimant had been paid for such work, a new constant was adopted by the Engineer Department of the District government

for estimating the excavation, and the appellant insisted upon paying claimant according to the new constant for work completed prior to its adoption, although it made his compensation $309.55 less than it would have been under the constant in force when the contracts under which the work was done, were made. But the appellant refused to allow more than the work amounted to under this new constant, and the claimant accepted the same under protest

The court below was correct, therefore, in allowing claimant pay in accordance with the constant in force at the date of the contracts under which the work was done, and with reference to which they were made. Under the facts as found by the court below, it was a part of the contract that claimant should be paid in accordance with that earlier constant as much as if a stipulation to that effect had been inserted in the contract.

Where a party is entitled to a specific price by contract, the giving of a receipt in full upon payment of a less amount, is no bar to a recovery of the balance. This is especially so where the acceptance of a part is under protest.

Such payment and acceptance is a bar only where there is a fair and reasonable ground of controversy, and in settlement thereof the one pays and the other accepts a sum certain in settlement of the controversy.

Here there was no reasonable ground of controversy, but simply a flat and unreasonable refusal on the part of appellant to pay the contract price. Claimant contended for his rights as long as there seemed to be reason in so doing, and finally accepted, under protest, what defendant would pay.

SECOND.

For lowering the water-main on Beall street a second time, ... $148.00

This item is referred to in the first paragraph of the sixth finding of facts by the court below. (See p. 33 of the record.)

That finding is that this work was done, and that the charge is reasonable, and that it has not been paid for. That leaves nothing for this court to pass upon.

THIRD.

Difference between contract prices and amounts paid claimant for two traps and basins, $93.67

This item is referred to in the second paragraph of the sixth finding of facts by the court below. (See p. 33 rec.) The facts there stated are that claimant furnished two traps and basins for which he was entitled to be paid by contract certain prices, but was paid at lesser prices, and that the aggregate of the differences is the amount stated. Of course that leaves nothing for consideration here.

COUNTER-CLAIM

FOURTH.

Alleged excess in allowance of excavation for sewer trenches, . . . $2,639.00

This is the first item of the rejected counter-claim, and the facts in relation to it are set forth in the FOURTH finding of facts by the court below. (See pp. of record 30 to 33, especially the last paragraph of the finding on p. 33.)

This item is substantially disposed of by what has been said in relation to the first item. The excavation for which this money was paid was all done under the administration of the Board of Public Works, and paid for by it, before the change in the form of government was made, and before the method of estimating the excavation was changed. The claimant made his estimates and bids for work, upon the basis, and upon the supposition that this method would be followed in estimating the excavation. It became a substantial part of the contract, and he has been paid in accordance with it. The only reason now urged for recovering it back is that it allowed for excavation more than it would have amounted to at the current rates, if the quantity had been actually measured. This must be largely conjecture, because it was not actually measured. Besides there was much other work, and many other expenses, devolving upon the contractor in constructing the sewers. He aggregated them in making his bids and contracts, and it would be inequitable to him to force a change in the contract, even if it were legal to do so.

This was not a payment made in fraud, or under any mistake of fact, and no principle of law or equity is perceived in accordance with which it can be recovered back.

FIFTH.

Alleged erroneous payment to claimant for shoring left in sewer trenchs, . . $5,929.89

The finding of facts in relation to this item is the 12th in number, and is found on p. 35 of the record

It appears that in 1875, upon report and certificate of the defendant's engineers, claimant was allowed and paid the above-named sum for shoring in various places, and the court below also finds that it does not clearly appear whether the shoring was left in the trenches or not.

The accounts in which these items were allowed having been stated by the agents of the appellant, it was incumbent upon it to establish by cogent proof that these were erroneous allowances, and having failed to do so, it can not be recovered back.

SIXTH.

Alleged erroneous payment to claimant for excavation caused by caving of trenches, $681.75

The facts in relation to this item are stated in the first paragraph of the ELEVENTH finding. (See p. 35 of record.)

It appears from that finding that this item was allowed claimant by the Board of Public Works, on the certificate of its engineers, for damage and excavation of caving during the progress of his work, and it does not appear whether the caving was caused by the action of the elements, or by some fault or neglect of the defendant,

In the court below the contention of the appellant was to recover this sum, because by the terms of the contract claimant was to suffer all damage caused by "the

action of the elements," and claimed that the work for which this sum was paid was so caused, but the evidence tended to show that it was caused by negligence of appellant's officers, and the court has found as a fact that the evidence does not establish which was the cause This is conclusive, and the appellant must fail upon this item.

SEVENTH.

Alleged excessive payment for excavation in made ground, . . . $838.00

The facts in relation to this item of counter-claim, as stated in the second paragraph of the eleventh finding, (see p. 35 rec) are that this sum was allowed claimant in excess of what should have been allowed by paying 50 cents instead of 40 cents per cubic yard. It was allowed upon the certificates of the proper engineers, and paid by the Board of Public Works, for what reason does not appear.

In the absence of evidence to the contrary, it must be presumed that the payment was correct, and appellant not entitled to recover it back.

EIGHTH.

A principle, applicable alike to all the items of counter-claim now in controversy, is that these sums were paid claimant upon stated accounts made by the officers and agents of the defendant, when all the facts and circumstances in relation to them were before them and fresh in the minds of the officers having charge thereof, and the accounts and payments are presumed to be correct, and he who would establish the contrary, must do so by cogent and convincing proof. In the language of

Chief Justice Marshall, speaking for this Court in the case of Chappedelaine vs. Dechenaux, 4 Cranch, 306: "No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be understood as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist."

To the same effect are Oil Co. vs. Van Etten, 107 U. S., 333–4, and authorities there cited.

Under this rule of law, and the facts as found by the court below, nothing is plainer than that the court below was correct in rejecting these items of the counter-claim.

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Att'ys for Appellee.